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NATIVES, NEWCOMERS AND NATIVISM: A HUMAN RIGHTS MODEL FOR THE TWENTY-FIRST CENTURY

Berta Esperanza Hernández-Truyol*

Editor's Note: This article was completed prior to the Fifth Annual Stein Center Symposium on Contemporary Urban Challenges, which took place on February 28, 1996. Since that time, several then-pending anti-immigrant bills discussed below have been enacted into law. Without changing the author's analysis, these enactments provide additional justification for her concerns.

Saturday, October 7, 1995. 7:00 p.m. Friends and I meet at an art gallery and, after looking at some of the new work, amble down the street to a local restaurant. The place is small and, as usual, crowded. We wait outside, chatting, for fifteen minutes before being seated. The owner leads us to our table, a crowded four-top arranged at a diagonal against the wall and flanked by two-tops on either side. With my computer in tow over my right shoulder and a jean jacket over my left arm, I stand at the top of the diagonal trying to figure out how I can get in to take my seat. All of a sudden, and out of the blue, I hear "Excuse me, you're in America now, you say 'excuse me,' SAVAGE, ANIMAL." It appears that a sleeve of my jacket has brushed against the Angry Diner. I have no opportunity to apologize or even to realize what has happened. Angry Diner continues to mutter, unintelligibly, under his breath. One of my friends, Rosa, who has been walk-

* Professor of Law, St. John's University School of Law. Many thanks to my research assistants Alison Nicole Stewart ('96), Jennifer Foley ('97), and John Woods ('97) for their invaluable work. Special thanks are due to Alison for her exceptional contribution to this piece, particularly her work on Part III. I also want to thank the members and editors of the Fordham Urban Law Journal for inviting me to write this essay. As someone who is "off the boat"—I was born in Cuba and was raised in Puerto Rico where I lived until high school graduation—I was clueless until rather recently that "real" Americans (meaning those from the United States, but not quite clear yet on who that would include/exclude) would consider me an "outsider/other." That epiphany was quite disarming. My response to that realization was avoidance. Writing this essay has forced me to learn about, as well as to confront, the history of exclusion of "others/outsiders" and to think constructively about how to move towards the future with a kinder, gentler view towards newcomers, some of whom might bring dramatically different cultures, languages, religions and even dress. Finally, a special thanks to my parents, my first and continuing role models, whose encouragement and support for every venture I have ever pursued (regardless of how adventurous or simply off-beat) have allowed me to explore my oft-quirky curiosity.

ing right behind me, upon seeing my stunned expression simply says, "Forget it, let's just sit down." By the time Meika and Mercedes, our two other friends, join us, they are rather curious—wondering what mischief I have caused. After relaying the incident to my now equally stunned friends, we move on to have our nice dinner, or try, anyway. Angry Diner, Rosa tells me later, never stopped muttering things under his breath. Finally, I think peace is at hand when Angry Diner and his companion get up to leave. He moves their table towards ours so that she can negotiate a tight corner (on the other side of our table). As he passes our table, he turns around, stares at me, utters an obscenity, and shoves Meika's chair before rushing to make his final exit—this time with wait persons chasing after him. Again, we are stunned. The restaurant owner joins our table to find out what had taken place, and after hearing the whole sordid story she says, "This is America, eh? Sure it is, and he is not welcome here anymore." Her English, unlike mine, is foreign accented; her look, unlike mine, is not brown.

I. Introduction

Imagine. It is 1996 and we are about to move into the twenty-first century. We live in a city that is known globally as *The City*. *The City* where, since the turn of the nineteenth century, Lady Liberty, the quintessential representation of freedom, has greeted foreign subjects. The poem gracing her impressive figure is a symbol of welcomeness, diversity, shelter:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, the tempest-tost to me,
I lift my lamp beside the golden door.¹

Unfortunately, this feeling of fellowship is anything but evident in our glorious city, across our nation, or even world-wide these days. This was made patently clear to *me* while trying to enjoy a quiet dinner with friends. Examples of this lack of fellowship can be seen in California, with its now-infamous "Save Our State" Proposition 187, Florida, with its Proposition 187 clone proposal, and in the initiatives of the Federal Government—taking anti-immigration sentiments national—which seek to exclude so-called "il-

1. EMMA LAZARUS, *The New Colossus*, in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 40 (Morris U. Schappes ed., 1944) (poem engraved on plaque affixed to the base of the Statue of Liberty in 1903).

legal aliens"² by ensuring the denial of critical health, education and welfare benefits. The moniker alone reveals the animus against newcomers—they are neither illicit, as a person cannot be, nor other-worldly. Remarkably, there currently exists a move to deny citizenship status to those *born* on United States soil,³ and to deny certain benefits to naturalized citizens.⁴ Such developments make one wonder what has occurred to the apparent (but largely

2. Proposition 187, Section 1, "Findings and Declaration [of the People of California]" provides, in pertinent part, as follows:

That they have suffered and are suffering economic hardship caused by the presence of *illegal aliens* in this state.

That they have suffered and are suffering personal injury and damage caused by the criminal conduct of *illegal aliens* in this state

Therefore, the People of California declare their intention . . . to prevent *illegal aliens* in the United States from receiving benefits or public services in the State of California.

(emphasis supplied). Significantly, the use of the clearly derisive term is not grounded in law.

See ELIZABETH BOGEN, IMMIGRATION IN NEW YORK 50-51 (1990) ("The term 'illegal alien' exists nowhere in immigration law or in any other U.S. law. It is strictly a colloquial term, used to describe aliens who are living or working in the United States without official authorization. It covers a spectrum of aliens whose claims to legal status vary from virtually hopeless to almost certain. The term is misleading in that it suggests a pervasive flouting of the rules, which is far from common practice among the country's aliens The term "illegal" is also misleading in that it suggests a criminal immigration status. Technically, unauthorized presence in the United States is a civil offense, not a criminal one. In *theory*, it is not punishable by the criminal penalties of imprisonment or fine.") (emphasis added).

Currently, Mexicans are the largest group of undocumented aliens in this country and are prime targets for the nativist movement, particularly in border states such as California, as exemplified in Proposition 187. The Caribbean, particularly the Dominican Republic, Haiti and Jamaica, is also a major source region for "illegal immigrants." JUDITH BENTLEY, AMERICAN IMMIGRATION TODAY: PRESSURES, PROBLEMS, POLICIES 35, 94-95 (1981).

Legal residence in the United States depends on birth within the country and in some cases outside the country, depending on the status of the parent(s), or compliance with the immigration statutes and amendments which provide for admissions based on visa grants or waivers as well as various other criteria, such as marriage to a U.S. citizen or permanent resident alien. The Immigration Marriage Fraud Amendments of 1986 extends a two-year "conditional" residence status to eligible spouses pending verification of the marriage's validity.

3. Remarkably, there is a resolution before Congress, H.R. J. Res. 88, 104th Cong., 2d Sess. (1995), which seeks to amend the U.S. Constitution in order to *deny* citizenship to those *born in the United States*, unless at time of birth a parent is a citizen. A second resolution, H.R. J. Res. 64, 104th Cong., 2d Sess. (1995), would restrict citizenship even further to only those persons with *mothers* who are citizens or legal residents. For a discussion of the citizenship rules for children born outside the U.S., see RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS, 633-34 (2d ed. 1992).

4. S. 1394, 104th Cong., 1st Sess. (1994) (proposal to bar new U.S. citizens from receiving certain government benefits).

mythical) *esprit de corps* that welcomed foreigners in earlier days of our republic.

I can think of no better way of celebrating the 40th Anniversary of the New York City Commission on Human Rights⁵ than by reviewing the role alienage has played in the development of this country and challenging *the City* to take the lead in rejecting the nativistic animus towards new-newcomers. In seeking such a goal, this essay proposes a human rights model for the pursuit of equality, liberty and justice for all. To develop these themes, Part II briefly reviews the history of the City Commission and Part III traces the history of migration/immigration and the parallel legacy of nativism, particularly with respect to those newcomers more clearly identifiable as "outsiders/others." Against this background, Part IV presents the legal developments on alienage discrimination in the United States. Part V introduces the relevant sources of international human rights norms generally and sets forth specific provisions protecting individuals based on their status. Finally, Part VI urges the adoption of a human rights paradigm to confront and invalidate alienage classifications and discrimination. Such a model renders a reality of the spirit of the City Commission's equality goals and ideals, positing this as every New Yorker's—old and new alike—challenge for the twenty-first century.

II. The City Commission: a Brief History

The City Commission's statement of policy leaves no room to question its purpose:

[i]n the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, *alienage or citizenship status*, gender, sexual orientation, disability, marital status, whether children are, may be or would be residing with a person or conviction or arrest record. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination . . . and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. A city agency is hereby created with power to eliminate and prevent

5. Throughout this paper, I will refer to the New York City Commission on Human Rights as the "City Commission."

discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry and discrimination . . . as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.⁶

The origins of the City Commission itself date to 1944 when Mayor Fiorello La Guardia established the Mayor's Committee on Unity to address racial tensions in the City.⁷ This Committee, comprised of between twenty and thirty unsalaried mayoral appointees, is credited not only with the passage of state laws such as the State Fair Employment Legislation⁸ and the Fair Educational Practices Act,⁹ but also with breaking the race barrier in professional baseball and dealing with anti-Semitism.¹⁰

Despite the Committee's great successes, as the quantity and complexity of "unity"-related issues grew, it became apparent that a more formal government structure with a clear mandate and specified jurisdiction and powers was necessary. Thus, in 1955 Mayor Wagner established the Commission on Intergroup Relations¹¹ (COIR) as the vehicle for promoting understanding and respect between and among the many groups making the city their home. Two years after COIR's establishment, it was given authority to receive and investigate complaints and take action with respect to the prohibition of employment discrimination on the basis of race, religion, or national origin in city agencies.¹² It is a testament to the unique spirit of "unity" and diversity of the City that this non-discrimination in employment directive predates the federal law by nearly a decade.¹³ By 1962 the non-discrimination policy had resulted in the inclusion of an equal employment opportunity element for city contractors which required cooperation with COIR's compliance reviews and ultimately led to the es-

6. NEW YORK, N.Y., ADMIN. CODE § 8-101 (1996) (emphasis added).

7. New York City Commission on Human Rights Background Paper, on file with author [hereinafter CHR Backgrounder] at 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. New York, N.Y., Local Law No. 55 (June 3, 1955) (codified as amended at NEW YORK, N.Y., ADMIN. CODE § 8-106 (1996)).

12. Robert F. Wagner, Mayor of the City of New York, Executive Order No. 41 (June 7, 1957).

13. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994) (prohibiting discrimination in employment on the ground of race, color, religion, sex, or national origin).

tablishment of a contract compliance office to investigate incidents of major bias.¹⁴

The City Commission's powers were substantially enhanced in 1958 when it was given enforcement authority over the Fair Housing Practices Law.¹⁵ It is, of course, of major significance that the Fair Housing legislation, proscribing discrimination in private housing, was the first of its kind in the country.

In 1962, COIR became the Commission on Human Rights in recognition of the national focus on civil and human rights. The City Commission expanded its work to include additional projects such as school desegregation. In December of 1965, the laws establishing COIR¹⁶ and mandating fair housing practices¹⁷ were amended and combined into the Human Rights Law of the City of New York.¹⁸ These amendments empowered the City Commission to fight discrimination in public accommodations, employment, and housing on the grounds of race, sex, age, and national origin.¹⁹ This cutting-edge law not only made the City Commission's jurisdiction correspond to that of the New York State Commission Against Discrimination, but it again placed New York City at the forefront of anti-discrimination legislation by establishing age as a protected class.²⁰

In 1968, amendments to the human rights law provided protection against discrimination in housing, employment and public accommodation on the basis of physical handicap. Two years later, Mayor John V. Lindsay issued Executive Order No. 22²¹ barring discrimination by city agencies on the bases of race, creed, color, national origin, ancestry, sex, or age. This order also empowered the City Commission to receive and investigate complaints of such discrimination and mandated a reassessment of sex- and race-based requirements for city jobs.

In the two decades that followed, the city continued to expand the law, remaining in the forefront of non-discrimination initia-

14. CHR Background, *supra* note 7, at 2.

15. New York, N.Y., Local Law No. 80 (Dec. 30, 1957).

16. New York, N.Y., Local Law No. 55 (June 3, 1955).

17. New York, N.Y., Local Law No. 55 (Dec. 30, 1957).

18. New York, N.Y., Local Law No. 97 (Dec. 13, 1965). The resulting Human Rights Law was codified at NEW YORK, N.Y., ADMIN. CODE § 8-107 (1996).

19. *Id.* Sex discrimination in public accommodation was added to the law in 1970.

20. Once more, the City was ahead of the Federal Government. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1994) (prohibiting discrimination in employment on the basis of age).

21. John V. Lindsay, Mayor of the City of New York, Executive Order No. 22 (Aug. 24, 1970).

tives.²² In the 1970s, the law secured jurisdiction over discrimination on religious grounds, even requiring employers to make accommodation of religious practices in both observance and dress.²³ Prohibitions against discrimination in housing on the basis of sex and marital status were added to the law, and the age-based protections were expanded.²⁴ Discrimination by private employers on the grounds of prior conviction record as well as past alcohol abuse or alcoholism became prohibited.²⁵

By 1981, the human rights law covered physical and mental handicaps.²⁶ In contrast, the President of the United States did not sign the parallel federal statute, the Americans with Disabilities Act, until 1990²⁷—almost a decade later. In addition, a bill was added to the city law to prohibit discrimination by private clubs,²⁸ and housing protections were increased by prohibiting discrimination against persons with children.²⁹

Two late 1980s amendments to the city human rights law are significant in confirming New York City's status as a leader in legislative non-discrimination protections. The first, passed in 1986, prohibited discrimination on the basis of sexual orientation³⁰—a topic that today, almost ten years later, is still the focus of much debate and controversy at both the local³¹ and federal levels.³² Fi-

22. In 1974 The City Commission was designated as a Section 706 deferral agency by the Equal Employment Opportunity Commission (EEOC), and was permitted to process employment complaints forwarded by the EEOC.

23. New York, N.Y., Local Law No. 74 (Nov. 6, 1972).

24. Persons between the ages of 18 and 65 are now protected in matters of housing and employment.

25. New York, N.Y., Local Law No. 39 (Sept. 16, 1991) (prior conviction record); New York, N.Y., Local Law No. 49 (June 16, 1981) (alcoholism).

26. New York, N.Y. Local Law No. 49 (June 16, 1981).

27. Pub. L. No. 101-336, 104 Stat. 327.

28. New York, N.Y., Local Law No. 63 (Oct. 24, 1984). This law only reached clubs with over 400 members, received income from non-members, and did not have an impact on purely social clubs.

29. New York, N.Y., Local Law No. 17 (June 25, 1986).

30. New York, N.Y., Local Law No. 2 (April 2, 1986) (amending NEW YORK, N.Y., ADMIN. CODE § 8-107(16) (1996)).

31. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996) (striking down Colorado's now-infamous Amendment 2, which sought to prevent municipalities from passing local laws that prohibit discrimination on the basis of sexual orientation).

32. President Bill Clinton never signed his promised executive order prohibiting the military from "discriminating" on the basis of sexual orientation because of public outcry against the policy. Few will ever be able to forget the Senate Hearings that ultimately resulted in the compromise policy of "Don't Ask, Don't Tell, Don't Pursue" which Judge Nickerson of the Eastern District of New York struck down as an unconstitutional First Amendment violation. *Able v. Perry*, 880 F. Supp. 968 (E.D.N.Y. 1995), judgment vacated by 88 F.3d 1280 (2d Cir. 1996). A federal bill

nally, in 1989 the City proscribed discrimination on the basis of alienage, meaning citizenship or alien status. This protection is broader than the federal law in that it covers not only employment but also housing and public accommodation;³³ the federal Immigration Reform and Control Act of 1986³⁴ ("IRCA") only affords such protection in employment. The final significant development was a 1991 amendment to the New York City human rights law creating a private right of action for violations of the law (with jurisdiction lying in the Supreme Court of the State of New York), permitting the imposition of civil penalties of up to \$100,000, and prohibiting age discrimination in housing and public accommodations.³⁵

As is clear from this brief description of the law, New York City's human rights law is one of the most comprehensive in the country and has been on the cutting edge since its origins. Having been a national, if not global, leader with such innovative legislation, New York now faces the challenge of making these legal rights and the spirit of the laws as represented by Lady Liberty an everyday reality in the twenty-first century. Regrettably, the City's warm, open-armed welcome to the foreigners who are the tired and the poor and the homeless has not always been true to life, with early laws excluding "undesireables"—the feeble-minded,³⁶ paupers or vagrants³⁷—and even charging a price for admission.³⁸

being introduced by Senator Edward Kennedy to prohibit discrimination in employment on the basis of sexual orientation, which the President has vowed to support, is not given a fighting chance in the Senate.

33. New York, N.Y., Local Law No. 52 (July 18, 1989).

34. Pub. L. No. 99-603, 100 Stat. 3359. This law was meant to curb illegal immigration by imposing penalties on employers who hired undocumented foreigners. Anticipating that the threat of sanctions could lead to an increase in employment discrimination, Congress included a provision making it unlawful to discriminate based upon national origin or citizenship. In addition, the law provided for the legalization in status of undocumented foreigners who could establish long-term presence and those aliens who had provided agricultural services in the United States.

35. New York, N.Y., Local Law No. 39 (June 18, 1991).

36. Immigration and Nationality Act [hereinafter INA], ch. 477, § 212(a)(1), 66 Stat. 163, 182 (1952). Later, Congress substituted "mentally retarded" for "feeble minded." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15, 79 Stat. 911, 919.

37. INA § 212(a)(8).

38. *Henderson v. Mayor of the City of New York*, 92 U.S. 259, 273 (1875) (state tax scheme imposing head tax on immigrants nullified using commerce clause and emphasizing that regulation of immigrants "is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation").

III. A Brief History of Alienage and Nativism

A. Historical Roots

Perhaps the heart of the problem of nativism can be explained in a New York Minute. In the play, *The Melting-Pot*,³⁹ a Russian Jewish "pogrom orphan" glorifies America, his new nation, thus:

America is God's Crucible, the great Melting Pot where *all the races of Europe* are melting and reforming! Here you stand, good folk, think I, when I see them at Ellis Island, here you stand in your fifty groups, with your fifty languages and histories, and your fifty blood hatreds and rivalries. But you won't be long like that brothers, for these are the fires of God you've come to - these are the fires of God. A fig for your feuds and vendettas! German and Frenchman, Irishman and Englishman, Jews and Russians - into the Crucible with you all! God is making the American. . . . The real American has not yet arrived. He is only in the Crucible, I tell you - he will be the fusion of all races, perhaps the coming superman.⁴⁰

It is significant that the glorification of America is limited to the "races of Europe"—a rather homogeneous stock that could be put into a pot and stirred with the end result looking pretty much like any of the particular individual ingredients. This recipe plainly excludes those who would not blend with, but would, rather, color the stock—Blacks, who were brought to these shores not free but chained and who had by the time of the play gained freedom in law but certainly not in fact, American Indians, ironically the *original* Americans, Asians, who have experienced a history of exclusion, Latinas/os and various "others/outsideers."

Since 1820, over 61,500,000 persons, mostly immigrants,⁴¹ have been admitted into the United States, approximately 804,400 of them in 1994 alone.⁴² The emerging predominance of non-Euro-

39. ISRAEL ZANGWILL, *THE MELTING-POT*, New York (Macmillan, 1939).

40. *Id.* at 33-34 (emphasis added).

41. For a brief chronology of immigration legislation, see BOGEN, *supra* note 2, at 28-30.

42. These 1994 immigrants came from Asia (292,600), North America (272,200), Europe (160,900), the Caribbean (104,800), South America (47,400), Central America (39,900), Africa (26,700), Oceania (4,600), and a handful from unreported/unknown regions. U.S. Department of Justice, Immigration and Naturalization Service (Statistics Division), *INS FACT BOOK: SUMMARY OF RECENT IMMIGRATION DATA*, August 1995 [hereinafter *INS FACT BOOK*]. The countries supplying the majority of these most recent immigrants were Mexico, China, Philippines, Dominican Republic, Vietnam, India, Poland, Ukraine, Russia and Cuba, and the state of California admitted the most, some 209,000 immigrants in 1994, followed by New York (144,000), Florida (58,000), Texas (56,000) and New Jersey (44,000). *Id.*

pean sources of today's immigrants to the United States is due, in large part, to the 1965 replacement of an immigration policy based on national origins quotas⁴³ by a seven-tiered preference system which favors relatives of citizens as well as skilled workers.⁴⁴

Some of the nation's newcomers are not immigrants, but rather refugees or asylees,⁴⁵ applicants who must satisfy a different set of standards to gain entry: a "well-founded fear of persecution" if they return home.⁴⁶ Historically, different refugee groups of a certain *cause célèbre* have benefitted from special policy considerations concerning their admittance into the country. In 1960, in response to Fidel Castro's ascent to power, the United States established a refugee program specifically aimed at Cubans.⁴⁷ Twenty years later, President Carter created the category of "entrant" to allow admission of both Cuban and Haitian boat people arriving off the coast of Florida.⁴⁸

43. Temporary National Origins Quotas set in 1921 became permanent with the passage of the Johnson Act, ch. 190, 43 Stat. 153 (1924). The McCarran-Walter Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, and its subsequent amendments are now referred to as the INA and form the bulk of current immigration legislation.

44. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (Amendments to the INA). To be sure, the most significant amendment to the INA was the removal of national origins quotas. There have been numerous other amendments made to the INA, including the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, and the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 [hereinafter IRCA].

45. For a discussion of refugee and asylee status and procedures, see generally THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY, ch. 8 (3d ed., 1995); BOSWELL, *supra* note 3, at 147-94.

46. INA § 101(a)(42)(A); BOGEN, *supra* note 2, at 55. Earlier refugee admissions policy was governed, in part, by the War Brides Act, ch. 591, 59 Stat. 659 (1945); the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009; the Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400; and the Fair Share Refugee Act, Pub. L. No. 86-648, 74 Stat. 504 (1960). The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, established an organized resettlement program and resulted in, among other things, the placement of many Vietnamese, Cambodian, Polish, Romanian and Afghani refugees in New York City. BOGEN, *supra* note 2, at 29-30.

According to INS statistics, most refugees in 1994 were from Vietnam, former Soviet Union and Bosnia-Herzegovina. Notably, only 18 percent of Haitian refugee applications were approved. As for those seeking asylum in the U.S., most were from Guatemala, El Salvador, China, Haiti and Mexico. INS FACT BOOK, *supra* note 42.

47. For a brief history of the Cuban migration, see Berta Esperanza Hernández-Truyol, *Building Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 391-93 (1994)[hereinafter *Building Bridges*].

48. The situations and responses to Cuban and Haitian refugees highlights the inconsistent and controversial history of U.S. refugee policy in general and towards our two widely divergent Caribbean neighbors in particular. "For Cubans in flight from Castro's Communist regime, there were programs of welcome; for Haitians who were

As illustrated in the Cuban-Haitian dichotomy, the often political and pragmatic nature of U.S. refugee policy continues to be the subject of much criticism from those who argue for a more liberal and moral approach based on humanitarian principles.⁴⁹ Until the 1980s, cold-war "ideological considerations" favored those fleeing Communist or otherwise "hostile" countries, *i.e.* hostile to the U.S. government, regardless of actual abuses imposed on those seeking to leave.⁵⁰

Socio-economic factors also play a part in the grant or denial of entry to many of those seeking refuge in this country. With the notable exception of Ethiopians and more recently Somalians, applications from Africans have been scantily approved.⁵¹ Also, the Cubans, Haitians and Vietnamese who are admitted into the U.S. are disproportionately skilled, professional and well-educated as compared to the general populace of their home countries.⁵²

Recently, in a clearly politically motivated move, this country reversed its over-30-year-old policy of welcoming Cubans. The United States now disallows entry to persons fleeing Cuba, going so far as to intercept Cubans fleeing the island at sea and return

in flight from the Duvalier regime, with which the United States had friendly diplomatic relations, there was unrelenting rejection. U.S. policy makers contended that Haitians generally left their country in search of economic opportunity, not to flee political repression. Economic distress, under U.S. law, does not constitute grounds for refugee or asylee status." BOGEN, *supra* note 2, at 134-35.

As a result of a lawsuits by detained Cuban entrants, the INS declared Cuban entrants eligible for permanent resident status and citizenship under the Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161. "No such action was taken on behalf of the Haitians." BOGEN, *supra* note 2, at 137. In 1986, after decades of detention, interception and return of thousands of Haitians, President Reagan signed the IRCA, *supra* note 44, which finally gave Haitian entrants the right to legal resident status and established an "amnesty" program for Cuban-Haitian entrants and other unauthorized aliens living in the U.S. who arrived before January 1982. BOGEN, *supra* note 2, at 138.

For a discussion of the Cuban lawsuits, see ALEINIKOFF, *supra* note 45 at 446-52, 465-73.

49. See, e.g., Mark Gibney, *United States Immigration Policy and the "Huddled Masses" Myth*, 3 GEO. IMMIGR. L.J. 361, 381-86 (1989). The author, a political scientist, proposes a revamping of U.S. alien admission policy "to assist those who are truly in need of assistance." *Id.* at 366.

50. *Id.* at 370-71. Referring to America's "calculated kindness", the author states "Individuals fleeing from countries where there are gross human rights violations and where persecution comes in its most pernicious forms either find a safe haven in other countries, or they do not find it all." *Id.* at 371 (*italics in original*).

51. *Id.* at 374 (citations omitted).

52. *Id.* at 372-74 (citations omitted).

them to Castro's much-maligned hands.⁵³ Indeed, as the Cuban "boat people's" income and educational levels have become lower, there has been a steady decline in their approval and acceptance, particularly among their compatriots already in Florida.⁵⁴ This change of heart simply parallels the general trend with respect to "illegal aliens": it is arguably their usually very low socio-economic status that makes their presence in this country so undesirable.⁵⁵

In addition to the various entrants, refugees, immigrants and aliens in the United States, a great many non-immigrant foreigners are admitted as temporary visitors or workers, students, transient aliens, foreign government officials and representatives of international organizations.⁵⁶ Currently, approximately nine percent of the United States population is foreign-born.⁵⁷ Adding to the mix, the vast majority and increasing diversity of America's *native-born* populace, the final scenario resembles less and less the nostalgic melting pot image so eloquently described by Mr. Zangwill in his 1909 drama.

*Beyond the Melting Pot*⁵⁸ captures the irony of exclusion. Although the notion of "the melting pot" is "as old as the Republic," as "the number of individuals and nations involved [in adding to the stock pot] grew, the confidence that they could be fused together waned, and so also the conviction that it would be a good thing if they were to be."⁵⁹ Paradoxically, even within the homogeneous components of the blend, "[t]here were ways of making distinctions among Welshmen and Englishmen, Yorkers and New Englanders, long before people speaking *strange tongues and practicing strange religions* came upon the scene."⁶⁰ It is noteworthy that even this critique fails to consider those "others/outsideers" who *already* were in the United States, namely the same Blacks, American Indians, Asians and Latinas/os as well as women from all the groups who historically, and until very recently, have not even been deemed worthy of mention as a class with particularized con-

53. President Bill Clinton, Press Conference (Aug. 19, 1994) (transcript available at 1994 WL 446481). See also Berta Esperanza Hernández-Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 39-44, 44 n.139 (1994).

54. Building Bridges, *supra* note 47, at 391-93.

55. Gibney, *supra* note 49, at 375.

56. There are nineteen general categories of non-immigrant visas. INA § 101(a)(15). See also INS FACT BOOK, *supra* note 42.

57. March 1994 Current Population Survey.

58. NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT* (1963).

59. *Id.* at 288-89.

60. *Id.* at 291 (emphasis added).

cerns in the alienage discourse.⁶¹ However, this essay is getting ahead of itself as any discussion of the "melting pot", others/outsideers and the many forms and expressions that American nativism has taken and continues to take, must begin with the genesis of America itself.⁶²

The first in time on our shores, the earliest *natives*, were the Indians.⁶³ They were eventually outnumbered and overpowered by the mostly-European settlers who immigrated to the New World from such faraway places as Great Britain (England, Scotland, Wales, Ireland), Germany, Scandinavia and French Canada—making up the homogeneous stock of oldest immigrants described by "melting pot" theorists. In fact, 95 percent of the 4.3 million immigrants that populated this country between 1840 and 1860⁶⁴ came from Great Britain and Germany alone.⁶⁵

In the 1890s, a new tide of immigrants from eastern and southern Europe, namely Italians, Slavs, Poles, Russians, Hungarians, Greeks and Jews, broke this Nordic circle of Western and Northern Europeans.⁶⁶ While the shifting demographics did not alone ac-

61. For two pieces that have addressed the discriminatory nature of Proposition 187 and its clones on the basis of gender, see Kevin Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995); Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan Perea ed., 1997) [hereinafter *Rights in Collision*].

62. It can be argued that the earliest European settlers were not really immigrants in the traditional sense of the word because there was no America to emigrate to at the time. These settlers "were emissaries of foreign royalty, religious iconoclasts, entrepreneurs, adventurers, intellectuals, military leaders." DAN LACEY, *THE ESSENTIAL IMMIGRANT* 57 (1990).

63. The situation of the American Indian, whose current population numbers 1,878,285 according to the 1990 Census (U.S. Bureau of the Census, General Population Characteristics, American Indian, and Alaska Native Areas) is a peculiar one in the context of immigration. Clearly, they were and are not considered immigrants while still being subject to nativist tendencies and exclusion.

"There are strong parallels between our society's treatment of the Indians and its treatment of other subordinated groups, and the parallels begin with the ways whites assigned Indians to the category of the savage Other." KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 81-82 (1989). But see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (applying the "first in time" principle, Chief Justice Marshall gave priority to the land claims of one who derived his title from the "second in time" U.S. land grant patent over the claimant who derived his title from the "first in time" Indian Chiefs).

64. Before the early 1800s, immigration was not a major factor in America's population increases. BOGEN, *supra* note 2, at 14.

65. The potato famine accounted for a huge influx of Irish at this time.

66. JOHN HIGHAM, *SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA* 39-40 (1975).

count for the rise in anti-foreign sentiment, the animus with which these newcomers were often greeted bespoke a certain degree of cultural prejudice and intolerance. As historian John Higham has noted, "[b]y western European standards, the masses of southern and eastern Europe were educationally deficient, socially backward, and bizarre in appearance."⁶⁷

The Italians,⁶⁸ the Irish, and especially the Jews bore the brunt of early American nativism at the hands of their earlier European counterparts, who often considered their southern and eastern brothers to be members of an "inferior" and "beaten" race.⁶⁹ The descriptions of Italians are telling:

The Italians were often thought to be the most degraded of the newcomers. They were swarthy, more than half of them were illiterate, and almost all were victims of a standard of living lower than that of any of the other prominent nationalities Also, they soon acquired a reputation as bloodthirsty criminals.⁷⁰

It certainly did not help the Italians (or the Irish, for that matter) to be Catholic, as even the earliest English and Irish Protestants brought with them anti-Catholic opinions and stances.⁷¹ For instance, the Know Nothing Movement, a secret society formed to restrict non-Anglo Saxon immigration, gained popularity in the 1800s,⁷² and the Ku Klux Klan, another secret society formed by ex-Confederates, has since its inception been a particular nemesis of the Catholic faith and its practitioners.⁷³ Despite the criticism and bashing that Catholics have received throughout American

67. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* at 65 (2d ed. 1988).

68. Also pejoratively referred to as "Dagos" and "WOPs" ("without papers"), Italians were sometimes victims of lynching parties, mob beatings and riots. HIGHAM, *supra* note 67, at 91. Significantly, a recent study of Italian women lawyers posits that past prejudices against Italians as an ethnic group persist, perhaps compounded by gender prejudices, as shown by Italian women lawyers' "conspicuous absence" in the high prestige positions in the practice of law. Rosemary C. Salomone, *The Ties That Bind: An Interdisciplinary Analysis of Gender, Ethnicity and the Practice of Law*, 3 VA. J. SOC. POL. & L. 177, 193 (1995).

69. Gibney, *supra* note 49, at 368.

70. HIGHAM, *supra* note 67, at 66.

71. Cycles of religious intolerance have peaked and ebbed throughout American history. HIGHAM, *supra* note 67, at 6-9, 27-30.

72. LACEY, *supra* note 62, at 62.

73. For a historical look at the Ku Kluxers, see HIGHAM, *supra* note 67, at 286-99.

history,⁷⁴ "the Roman Catholic Church stands out as the largest private provider of services to immigrants in the city (of New York), and in the country as well."⁷⁵

The Irish, Protestant and Catholic alike, also experienced the mistreatment and maligning suffered by the Italians, as illustrated by the infamous "No Irish Need Apply" notations that often accompanied employment ads and help-wanted signs in New York, Boston and other cities.⁷⁶

Jewish immigrants fared no better than their Catholic counterparts.⁷⁷ Jewish immigrants were not allowed to vote in some states until the mid-1800s⁷⁸ and were (and still are to some extent) privately discriminated against in schools, associations and residential housing.⁷⁹ During the Depression, Henry Ford of the Ford Motor Company was a leading propagator of the anti-Semitic theory of "The International Jew"⁸⁰ . . . [a] world-wide power, conspiring against all nations . . . "⁸¹ In the 1930s, Jews fleeing Nazism⁸² were the largest group entering America.⁸³ On arrival, the Jews discovered that they had managed to escape German Nazis in order to compete against the Irish and other earlier immigrants for jobs and housing.⁸⁴ Such competition was particularly intense in New York.

74. Until 1777, Catholic clergy were banned from the colony and until the 1800s, foreign-born Catholics could not become citizens or hold public office in New York. BOGEN, *supra* note 2, at 142.

75. *Id.* at 140. "The Church has a long history of serving and absorbing immigrants," for example, by establishing national churches (e.g., Irish, Italian, German) within the parish system. *Id.* at 141. Today, the Church's biggest challenge appears to be criticism not from non/anti-Catholics, but from its own constituency.

76. LACEY, *supra* note 62, at 61; KARST, *supra* note 63, at 83.

77. HIGHAM, *supra* note 67, at 277 ("Of all the European groups that lay outside of the charmed Nordic circle none was subjected to quite so much hatred as the Jews.").

78. KARST, *supra* note 63, at 88.

79. *Id.* at 88-89. See also HIGHAM, *supra* note 67, at 161. Jews were subject to admission quotas and discrimination in private universities and professional schools such as N.Y.U., Columbia and Harvard. *Id.* at 278.

80. LACEY, *supra* note 62, at 72.

81. HIGHAM, *supra* note 67, at 277-86 (describing "The International Jew" theory and its attempt to further and legitimize anti-Semitism in America).

82. Interestingly, Congress defeated a bill in 1938 which "would have admitted thousands of Jewish children from Nazi Germany - all of whom already had sponsors in the United States - on the grounds that these children would have exceeded the German quota for that year," yet another glaring example of politics overriding humanitarian concerns in American immigration/refugee policy. Gibney, *supra* note 49, at 369 (citing DAVID WYMAN, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945* (1984)).

83. BOGEN, *supra* note 2, at 19 ("They made up a quarter of the decade's immigrants.").

84. *Id.*

Before and during World War II, the Jews were urging for U.S. military intervention, while Italian and non-Jewish German immigrants hoped to avoid United States intervention and the accompanying "accusations of dual loyalty they had encountered during World War I."⁸⁵

It was during World War I that Germans in particular became victims of nativist and nationalist fervor, expressed in the questioning of German-American (and Italian-American) loyalty. The German language and customs became increasingly suspect, with many states enacting laws to prohibit their use⁸⁶ and with a great nativist backlash against Germans becoming evident as soon as the United States entered the war.⁸⁷

The rejection of the "enemy within" replayed itself in World War II when thousands of Japanese were "relocated" from their West Coast homes to "internment camps" in the middle of nowhere. The Supreme Court in *Korematsu v. United States*⁸⁸ upheld this wartime order issued by then-President Franklin D. Roosevelt on the ground that national security justified such a suspect classification. Apparently, American nationalists, and the institutions that often succumbed to their demands, ignored or simply forgot their unwarranted maltreatment of Germans only a few decades earlier. As a noted scholar observed, "[o]ne of the saddest lessons of *Korematsu* is that we do not seem to learn much from the lessons of the past."⁸⁹

Certainly, there have always been and continue to be ethnic, religious, cultural and economic aspects of nationalistic and nativist ideology and anti-foreigner/anti-immigrant mentality. Undeniably,

85. *Id.* at 20.

86. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting teaching in any language other than English held unconstitutional).

87. HIGHAM, *supra* note 67, at 207 ("On the hapless German minority 100 percent Americanism broke with great force as soon as the United States entered the war."). Higham notes that much of this "anti-Germanism" persisted even after the war was over. *Id.* at 223.

88. 323 U.S. 214 (1944).

89. KARST, *supra* note 63, at 91. Interestingly, both World Wars, besides compelling a paranoia of disloyalty, highlight the recurring phenomenon of inter-ethnic conflict among various immigrant groups—non-German versus German immigrants in World War I, Jewish versus non-Jewish Germans and Italians in World War II, non-Japanese and Japanese also in World War II. Even in peacetime, there has been friction—between Catholic and Protestant Irish, Northern and Southern Italians and later, between Irish and Blacks, Cubans and Haitians, Koreans and Blacks, and so on. Inter-ethnic rivalry, although a global dilemma, has persisted and permeated throughout American society and will be explored further in the context of immigration, ethnicity and neighborhood clusters in New York City.

a race component figures in as well.⁹⁰ Nowhere is this more clearly evidenced than in the experiences of those who could hardly be called "immigrants" at all, namely Blacks.⁹¹ During the 1700's and until the importation of slaves was outlawed in 1808,⁹² hundreds of thousands of persons were captured in Africa and involuntarily shipped to this country as slaves. However, it should be noted that the *first* Blacks arrived in America in the early 1600's as "indentured servants who could earn their way out of bondage."⁹³ Free Blacks, both before and after emancipation and in ways both similar to and distinct from many immigrants, encountered racism both on the streets⁹⁴ and in the laws⁹⁵ of America.

Although largely subordinated within American society, Blacks were not then, and are not now, exempt from nativistic/ethnocentric tendencies, as shown by the intricate and intertwined relationship between the native-born Black community and Caribbean immigrants. In the early 1900's, more than 300,000 West Indians, particularly from Jamaica and Barbados, came to the United States; half settled in New York City.⁹⁶ Around this time, many Blacks from the South were also migrating north to places like

90. The early to mid-1900's saw several fashionable "race" theories, namely Darwinism, making the rounds in the so-called scientific and intellectual circles. The different nationalities and ethnicities were argued to possess different traits, with Anglo-Saxon ones being superior, of course. *THE ENCYCLOPEDIA OF NEW YORK CITY* 583 (Kenneth Jackson ed. 1995).

91. Keeping in mind the intricacies of ethnic identity, at least one scholar is quick to point out that even Black slaves imported into this country were not a monolithic group, even though often treated then and viewed today as such. See KARST, *supra* note 63, at 92 ("The peoples brought to this country by force from Africa were culturally diverse. On the plantations of the American South, however, their common bondage in slavery welded them into one people.").

92. While the *importation* of slaves was prohibited in 1807, the institution of slavery itself was not outlawed until 1865. Slave Trade Prohibition Act, 2 Stat. 426 (1807); U.S. CONST. amend. XIII, §1.

93. LACEY, *supra* note 62, at 58.

94. "A rash of anti-black incidents beset New York City during the Civil War" with many being instigated by the Irish, including a riot in 1863 that left 125 people dead, including eleven Blacks. *THE ENCYCLOPEDIA OF NEW YORK CITY*, *supra* note 90, at 113.

In the American South, with the rise of the Ku Klux Klan in the 1920's came a systematic campaign of terror and murder against Blacks. KENNETH S. STERN, *A FORCE UPON THE PLAIN: THE AMERICAN MILITARY MOVEMENTS AND THE POLITICS OF HATE* (Simon & Schuster 1996).

95. During the Reconstruction era, Jim Crow laws went into effect in the South. Interestingly, these segregation measures affected not only Blacks, "but Asians, Chicanos, and for a time, Italians, who were directed to all-black schools in some southern communities." KARST, *supra* note 63, at 88.

96. West Indians were largely unaffected by immigrant quotas because the islands were still colonies at the time.

Harlem, where they commingled and competed with persons from the Caribbean.⁹⁷ One leading commentator has observed that "[f]requently well-educated and entrepreneurial, West Indians provided most of the city's black doctors, lawyers, and dentists, and became major landholders in the black community, evoking some resentment among native-born blacks that still exists."⁹⁸

Puerto Ricans, whether born on the island or in the continental United States, like native-born Blacks, are also U.S. citizens.⁹⁹ Puerto Rican migration, particularly to New York City¹⁰⁰, has added these Spanish-speaking, brown citizens to the "migration" mix and consequently, the migration/immigration and nativism discourse.¹⁰¹

The role played by New York, and New York City in particular, as "the portal of portals",¹⁰² has had an extraordinary historical significance in the development of American immigration.¹⁰³ As Elizabeth Bogen notes,

Between 1820 and 1920 two-thirds of the nation's 34 million immigrants entered through the Port of New York. Although many traveled on to other destinations, nearly half of them settled in the city. Virtually every nationality was represented. The diversity attracted more newcomers, and does so to this

97. BOGEN, *supra* note 2, at 21. See also THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 90, at 585.

98. BOGEN, *supra* note 2, at 19. See also Randall M. Miller, *Introduction: The Post-World War II City*, in IMMIGRATION TO NEW YORK 187 (William Pencak et al. eds., 1991) (In 1980, "West Indians had higher incomes and better educations than most native-born blacks . . ."); BENTLEY, *supra* note 2, at 104 ("West Indians continue to prosper in New York . . . they achieve a higher occupational status and income in New York City than American blacks do.").

99. Jones Act, ch. 145, 39 Stat. 951 (1917). Section 5 of the Jones Act declared and deemed all citizens and natives of Puerto Rico citizens of the United States unless within six months of the effective day of the Act they opted to retain their "present political status."

100. "The Puerto Rican migration accelerated in 1945 with inauguration of air service between San Juan and New York. The number of island-born Puerto Ricans living in New York more than doubled between 1950 and 1960, from 190,000 to 430,000." BOGEN, *supra* note 2, at 21. For a brief description of the Puerto Rican migration, see *Building Bridges*, *supra* note 47, at 389-91.

101. "To be sure, Puerto Ricans . . . are a major variable in any discussion of the socio-economic, political, educational, and cultural issues of the city." Elliott R. Barkan, *Portal of Portals: Speaking of the United States "As Though it Were New York" - And Vice Versa*, in IMMIGRATION TO NEW YORK 218 (William Pencak et al. eds., 1991).

102. *Id.*

103. In the two decades since the national origins quotas have been repealed, "the surge in immigration from continents other than Europe has brought other states into prominence as ports of entry, especially California and Texas, whose airports and border cities have become beacons for immigrants from Latin America and Asia." BOGEN, *supra* note 2, at 3.

day. New York is still the gateway for a third of the country's immigrants, and still the American city with the most ethnically diverse population.¹⁰⁴

The federal immigration station at Ellis Island was opened in 1892 and replaced Castle Garden, which had opened in 1855, as the welcoming center for the "huddled masses yearning to breathe free."¹⁰⁵ Clusters of immigrants began to form ethnic neighborhoods such as "Little Italy" and "Chinatown" in the late 19th century.¹⁰⁶ While these neighborhoods helped to preserve cultural ties and associations by keeping immigrant groups together with their own kind, they also served to fuel inter-ethnic rivalries, further exacerbating the other/outsider crisis.¹⁰⁷

Notwithstanding the millions who have been welcomed at America's door in New York City, Los Angeles and elsewhere in the U.S., for all those who have been greeted with open arms or at least indifferent tolerance, there have been and continue to be those who are excluded¹⁰⁸, turned away¹⁰⁹ and discriminated against privately as well as by both the state¹¹⁰ and federal¹¹¹ governments. The most sweeping example of national nativistic policy

104. *Id.* at 11.

105. *Id.* at 15-16.

106. "The ethnic neighborhood, sometimes seen today through a haze of romantic nostalgia, was founded only partly on affinity. Ethnic discrimination ranged over the whole housing market, and racial segregation remains the pattern in today's urban neighborhoods." KARST, *supra* note 63, at 89.

107. An example of unneighborly conflict took place in post-World War II Washington Heights between the Irish and Jews, whose neighborhoods were divided by Broadway. Recently, immigrants from the Dominican Republic have replaced the Irish on the east side, creating a Dominican-Jewish rivalry as highlighted by the controversy surrounding the construction of a public elementary school to accommodate Dominican students on "Jewish turf" (and also across from a Catholic parochial school). BOGEN, *supra* note 2, at 78-79.

Another recent illustration of ethnic conflict in New York City involves the continuing tensions between Korean store owners and Black residents in Harlem—tensions with racial, cultural as well as economic implications that have at times erupted into violence and displays of hostilities on both sides.

108. See, e.g., Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *as amended and extended in* 1884 (ch. 220, 23 Stat. 115), 1888 (ch. 1064, 25 Stat. 504), 1892 (ch. 60, 27 Stat. 25), 1902 (ch. 641, 32 Stat. 176), and 1904 (ch. 1757, 32 Stat. 425). The constitutionality of the Act was upheld by the Supreme Court in *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889).

109. An example is the interception and repatriation of Haitian boat people and of Cubans headed for the coast of Florida.

110. Discriminatory actions at the state level have taken many forms over the years—some with specific target groups and others plainly anti-foreigner in general. For example, at the turn of the century, New York had passed laws excluding all aliens from jobs on state and local public works and charging aliens \$20 for hunting licenses which cost natives \$1. HIGHAM, *supra* note 67, at 72, 162.

is codified in the national origins quotas of the Johnson Act of 1924.¹¹² This undeniably nativistic-oriented¹¹³ law was compelled in part by World War I, the Depression and the Red Scare, and allotted a certain percentage of immigrant visas to groups based on their presence already in the U.S., "in an attempt to institutionalize the status quo of America's ethnic and racial mix."¹¹⁴ The national origins quota system was eventually abolished and replaced,¹¹⁵ but arguably the damage had already been done.¹¹⁶

B. Current Nativist Trends

Quotas, exclusions and indecent propositions like California's Proposition 187 are reminiscent of the Alien and Sedition Acts, literacy tests and bans on foreign language which, as unconstitu-

More recently, in November of 1994, California voters passed Proposition 187, an initiative denying certain health, social service and educational benefits to "illegal aliens," most of whom are Latinos/as from Mexico, El Salvador and Guatemala. Interestingly, California has had a rich, albeit not singular, history of closing its borders to others/outsideers. In the 1930's, California police even turned away the so-called "Okies" from the dust-bowl Great Plains Region, "even though they were merely moving *within* the 'United' States." LACEY, *supra* note 62, at 75.

111. In 1954, Mexicans were subject to a massive deportation effort by the INS—code named "Operation Wetback." For a full description of this operation, see JUAN RAMÓN GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980).

A list of immigration legislation introduced in the 104th Congress reveals 165 bills, resolutions and proposals, only a handful of which are arguably pro-immigration. The proposed Immigration Control and Financial Responsibility Act of 1996, S. 1664, 104th Cong., 2d Sess. (1996), is a federal version of California's Proposition 187.

112. Ch. 190, 43 Stat. 153 (referred to as "The Immigration Act of 1924"; also known as the Permanent National Origins Quota Act).

113. As one commentator noted, "even Adolph Hitler was so favorably impressed by America's use of immigration restrictions to steer the evolution of the country's gene pool in favor of Northwestern Europe - particularly in favor of Great Britain - that he wrote admiringly of America in his Nazi manifesto, *Mein Kampf*." LACEY, *supra* note 62, at 73.

114. LACEY, *supra* note 62, at 73. Britain got 42 percent of the visas, Ireland, Germany, and Scandinavia combined received 30 percent, the southern and eastern European countries shared 15 percent and "[t]he outright ban on the Chinese was extended to almost all Asians." BOGEN, *supra* note 2, at 18-19.

The INA repealed the ban on Asians, bringing them within the still-exclusionary quota system. 66 Stat. 163.

115. See Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (Amendments to the INA).

116. It should be noted that certain classifications of aliens ineligible for immigration visas and admission are still on the books, including the exclusion of the mentally retarded and insane, sexual deviants, drug addicts and alcoholics, those affected by certain diseases and disabilities, paupers, beggars and vagrants, illiterates, anarchists, Communists, criminals, polygamists, those coming to engage in "any immoral sexual act" or likely to become public charges. INA § 212.

tional as they were, "recognized nativist exclusion as an appropriate response to fear of foreign people and foreign ideas."¹¹⁷ These sentiments go far to explain much of what the legislators, politicians and nativist organizers want to do these days, such as establish English as the official language, promote prayer in schools, and protect the American flag. It appears that, once again, we have failed to learn our lesson from the history of "cultural politics"¹¹⁸ and "Americanism."

Essentially, the argument advanced in the contemporary immigration and "illegal alien" debate is that these others/outsideers cost "us" more than "they" contribute—an ironic charge considering who built this country in the first place.¹¹⁹ The economic dimensions of nativism cannot be denied: when we need cheap labor our borders open up; when jobs are in short supply, we not only shut them closed, we want to ship the "others" home.¹²⁰ Essentially, the overall impact that today's immigrants and aliens have on the U.S. economy in terms of employment, wages, tax contributions, social services, health and educational costs, and even housing and crime, is a complicated and multi-faceted issue that, at best, can be the subject of speculation and estimation.¹²¹ However, only the worst-

117. KARST, *supra* note 63, at 86.

118. *Id.* at 97 ("The emotionally charged quality of American cultural politics, today as in the nineteenth century, arises out of conflicts over status, with one group's anger matched against another group's fear.").

119. The substantial contributions made by immigrant labor to the infrastructure, industry and artistic and cultural vitality of New York City, for example, is but a tip of the iceberg. "At the turn of the century, immigrant labor - largely Italian, Hungarian, and Russian - built the subway system, the aqueduct, and the Bronx sewer system The garment trade was dependent on immigrant labor." BOGEN, *supra* note 2, at 17.

120. *Id.* at 90-91 ("In times of economic expansion, immigrants have been welcomed to the United States, and praised for their thrift and hard work. In hard times they have been denounced as unfair competition for native-born workers."). Additionally, the author notes that "[i]mmigrants, especially recent arrivals, are often willing to work at wages well below the levels accepted by native-born workers or required by law," resulting in the theory that they cause depression in wages. *Id.* at 93. It should be noted that many of these immigrants take the low-paying, menial jobs that no one else will.

121. BOGEN, *supra* note 2, at 4 ("Nationwide, immigration statistics are in a sorry state. Very few data are collected on immigrants except by the U.S. Census Bureau, and few studies have been done on the issues of primary import in policy making"). For instance, there are currently only three major reports attempting to calculate (not necessarily analyze, mind you) the costs and benefits of post-1969 immigration; the Huddle Study prepared by Dr. Donald Huddle of Rice University, and one by the Center for Immigration Studies which report a net annual deficit of \$44.2 and \$29.1 billion, respectively, and the Urban Institute Study by Michael Fix and Jeffrey Passel, which reports a net annual *benefit* of \$28.7 billion. *See also Rights in Collision*, *supra* note 61, at n.3 (on economic contributions made by immigrants/aliens).

disposed would even venture to ignore the contributions of these "outsiders" to this country, which contributions would include, in New York City for example, the many edifices, institutions, utilities, services and atmospheres created and maintained by American immigrants and their progeny.

Whether real or imagined, the "costs" of immigration only partly explains the current rise in nativist thinking and lawmaking. The balance of the explanation lies in the changing demographics of the incoming foreign population, many, if not most with darker skin and non-Western cultural heritages, practitioners of non-Western religions and native speakers of languages other than English, some even with dramatically different alphabets. The heterogeneity of this new "stock" does not easily permit blending into the mythical melting pot.¹²²

The urgency of the nativist movement has increased along with the increased visibility (and color)¹²³ of the others/outsiders. A noted historian links the cyclical re-emergence of nativism with a corresponding loss of confidence in America's health and its position in the world.¹²⁴ He notes that at the turn of the century

[n]ativism cut deeper than economic jealousy or social disapproval. It touched the springs of fear and hatred; it breathed a sense of crisis. Above all it expressed a militantly defensive nationalism: an aroused conviction that an intrusive element menaced the unity, and therefore the integrity and survival, of the nation itself.¹²⁵

This might well explain Proposition 187 and similar federal legislation. What besides fear could be the foundation of a law like Proposition 187?¹²⁶ This initiative, patently capitalizing on the

122. See, e.g., NADIA H. YOUSSEF, *THE DEMOGRAPHICS OF IMMIGRATION: A SOCIO-DEMOGRAPHIC PROFILE OF THE FOREIGN-BORN POPULATION IN NEW YORK STATE 1* (Center for Migration Studies 1989):

Since the late 1970s, the United States has been the recipient of a large influx of immigrants. Because these recent settlers came predominantly from Third World countries and are distinctive ethnically and racially from the migratory flow of the late 1880s and early decades of the 1900s, the presence of an immigrant population in the country has become decidedly more visible.

123. People of color, i.e., Asians, Caribbeans, and Latin Americans, comprised 46% of all immigrants in 1960. Twenty years later, that number rose to 80%. See BOGEN, *supra* note 2, at 22.

124. HIGHAM, *supra* note 67, at 12-14, 106-107.

125. *Id.* at 162.

126. This essay uses California's Proposition 187, aimed predominantly at immigrants from Mexico, as a concrete example of such a bill. It is not the only initiative of its kind. For instance, Florida is working on its own version (Florida Proposition

tight economic climate to promote hostility, prejudice and xenophobia—a basic fear of “others/outsideers”—in the name of protecting red-blooded, law-abiding, *real* Americans, seeks to deny health, education and welfare benefits to persons—young and old alike—who illegally enter the United States.¹²⁷ Out of hand (and without any factual support), Proposition 187 blames undocumented persons, statutorily denominated “illegal aliens”, for all that ails California: specifically, the depressed economic environment and crimes against persons and property. In response to the mischief such illegals are causing in the otherwise perfect state (and presumably state of affairs) of California, Proposition 187 is aimed at getting rid of these undesirable by not educating them, not taking care of their health, and generally running them out of the state.

To be sure, the pervasiveness and insidiousness of these recent nativistic movements might well create the false impression that this is a novel idea. But, as this section has shown, nativism is nothing new. In fact, it is as old as the republic itself and probably here to stay, even if at times it submerges beneath the surface. The plagues of America continue to be as they were—xenophobia, jingoism, nationalism, intolerance, prejudice, racism, ethnicism, sexism, homophobia, stereotyping, scapegoating, finger-pointing, race-baiting, fear-mongering, disillusionment, political discord, isolationism, and displacement, to name but a few of the sentiments expressed loudly and crudely on a daily basis over our airwaves.

As the world gets increasingly smaller and more colored, the nativists, in this age of anything but confidence and economic strength, have again lost sight of the advantages of a *world* community, the humanity of reaching out instead of turning away. Perhaps we *are* headed for critical mass—the melting pot boiling over as the fires of discontent burn out of control. To extinguish the flames we must focus not on stemming the tide of immigrants and aliens, but in changing the course of nativist thinking.

187), and a federal version, the proposed Immigration Control and Financial Responsibility Act of 1996, S.1664, 104th Cong., 2d Sess. (1996), has been introduced in the Senate.

127. This is not a new phenomenon. In fact, this country historically has resorted to scapegoating certain groups for the nation's ills during less than favorable times. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 236-38 (abridged ed. 1958) (analyzing the blaming of immigrants and other minorities for economic downturns).

IV. Alienage Discrimination

A. Introduction

By amending its human rights law to prohibit discrimination on the basis of alienage in 1989,¹²⁸ New York City jumped ahead of and against the tide of nativism surging in federal judicial opinions as well as federal legislation. While nativist law and policy-making seeks to exclude aliens from some of the most basic benefits and services, such as education and welfare, New York City's Human Rights law protects against discrimination¹²⁹ on the basis of "alienage or citizenship status," which is broadly defined to include "the citizenship of any person, or . . . the immigration status of any person who is not a citizen or national of the United States."¹³⁰

This generous framework is enhanced by the city policies expressly mandating that city services be provided to "aliens"¹³¹ and that they be encouraged to utilize available city services.¹³² This

128. This essay focuses on alienage, not national origin or race/ethnicity based discrimination. To be sure, there exists an overlap in these categories. For example, country of birth is not synonymous with, although it can be indicative of, citizenship or alienage. The Supreme Court recognized as much when it stated that "[r]efusing to hire an individual because he is an alien 'is discrimination based on national origin in violation of Title VII.'" *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 97 (1973). For a discussion on the difficulties of the construction of national origin, see Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WILLIAM & MARY L. REV. 805, 823-27 (1994). Similarly, ethnicity and national origin may overlap, with ethnicity "consist[ing] of a set of ethnic traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group." *Id.* at 833 (citation omitted).

Moreover, there is an intersection of alienage and immigration, but the fields are not synonymous. Rather, "'immigration law' concerns the admission and expulsion of aliens, and 'alienage law' embraces other matters relating to [aliens'] legal status. . . [and its] issues include access to public education, welfare benefits, government employment, and the ballot box, to name just a few of the most prominent." Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994) (footnote omitted). Professor Motomura notes that "[t]he line between 'immigration' and 'alienage' is elusive . . ." and that one "reason is functional overlap." *Id.* For other distinctions between alienage and immigration see Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

129. NEW YORK, N.Y., ADMIN. CODE § 8-101 (1996).

130. NEW YORK, N.Y. ADMIN. CODE § 8-102(21) (1996).

131. 43 RULES OF THE CITY OF NEW YORK, Ch. 3. Aliens are defined as persons who are not citizens or nationals of the United States. *Id.* at § 3-01.

132. *Id.* at § 3-03 ("Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.").

directive is 180 degrees from the nativist position that "aliens" deserve nothing.

In light of the city's generous law, it is curious that alienage cases comprise at most one percent of the City Commission's docket.¹³³ Certainly, given the climate in the country and world-wide, the city's edict embracing alienage as an impermissible ground for ill treatment stands to lead by example in the difficulties that newcomers are facing and are sure to face in the immediate future. As such, in entering the twenty-first century New York may once again come to symbolize a safe harbor, a place of refuge for "huddled masses yearning to breathe free".

B. Constitutional and Legislative Provisions

Considering the importance of New York City *vis à vis* foreigners, it is noteworthy that constitutional challenges to New York State laws have been a large source of the United States Supreme Court's alienage discrimination jurisprudence. The Constitution of New York provides that:

No *person* shall be denied the equal protection of the laws of this state or any subdivision thereof. No *person* shall, because of race, color, creed or religion, be subjected to any discrimination in his [or her] civil rights by any other person or by any firm,

133. Telephone interview with Rosemarie Maldonado, Chief Administrative Law Judge, Hearings Division, City of New York Commission on Human Rights (Sept. 21, 1995).

In one recent case involving alienage or citizenship status, *Nejman v. Sunnyside Home Care Project, Inc.*, Compl. No. E92-0462, Rec. Dec. & Ord. (Jan. 11, 1994), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Mar. 16, 1994), the City Commission dismissed the complaint on the merits. Administrative Law Judge Steven E. Preberg found no evidence of discriminatory intent or bias with respect to the termination of the complainant, who had originally obtained her position through the use of fraudulent documents. The Administrative Law Judge concluded that

[t]o have established this bias on the part of Respondents required the Bureau to show that Complainant was treated differently because of her alienage or citizenship status.[] In fact, all that was established was that Complainant was treated no differently than any other person who obtained employment through the use of fraudulent documents, was subsequently discovered, and due to her own fear and misunderstanding was unable to explain her circumstances fully to her employer.[] The Bureau also had to show that Respondents were aware of Complainant's amnesty participation, and chose to terminate her notwithstanding that knowledge. It was illogical, considering the employer's work force and client base that a discriminatory motive would be present. Upon the Bureau's completion of their direct case, it was also clear that no evidence of discriminatory motive was presented. The complaint should therefore be dismissed.

Id., slip op. at 16 (footnotes omitted).

corporation, or institution, or by the state or any agency or sub-division of the state.¹³⁴

As the Supreme Court has concluded, because this provision refers to *persons*, not to *citizens*, its protection extends to citizens and non-citizens alike.¹³⁵ Nonetheless, a review of New York's laws reveals that alienage matters.¹³⁶

To be sure, that foreigners in the United States enjoy certain constitutional guarantees is not the subject of serious debate, as clearly reflected in the Restatement:

(1) An alien in the United States is entitled to the guarantees of the United States Constitution other than those expressly reserved for citizens.

(2) Under Subsection (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinctions between aliens and citizens, or between different categories of aliens.¹³⁷

Effectively, the Restatement merely reiterates established precedent with respect to foreigners' rights.¹³⁸

134. N.Y. CONST. art. I, § 11 (emphasis added).

135. See *Plyler v. Doe*, 457 U.S. 202, 215 (1982) ("Use of the phrase 'within its jurisdiction' thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who's subject to the laws of a State. . . . That a person's initial entry into a State, or into the United States, was unlawful . . . cannot negate the simple fact of his presence within the State's territorial perimeter."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction . . ."). While this essay focuses on alienage and will use that term, this author finds the term "alien" rather distasteful in using it to refer to human beings from this universe who simply are foreign subjects. Thus, throughout this section, I will use the terms "foreigner" or "non-citizen" instead of "alien", and "undocumented foreigner" in lieu of "illegal alien".

136. For example, a bill pending before the New York legislature seeks to criminalize the bringing of undocumented foreigners into the state. S.B. 8690, 215th Gen. Ass., 2d Reg. Sess. (N.Y. 1994). New York law also requires that prison authorities investigate imprisoned aliens and report their findings to the INS. N.Y. CORRECT. LAW § 147 (McKinney 1987). Another pending bill would add New York to the list of states that require proof of legal residency from persons seeking a drivers license. S.B. 8610, 215th Gen. Ass., 2d Reg. Sess. (N.Y. 1994). See also CAL. VEH. CODE § 12801.5 (1996); N.J. REV. STAT. § 39:3-10 (1995).

137. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 (1987)[hereinafter RESTATEMENT].

138. See, e.g., *Yick Wo*, 118 U.S. at 369 ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction . . ."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (noting that aliens within United States territory are protected under Fifth, Sixth, and Fourteenth Amendments). It is significant that since the Fourteenth Amendment has made most of the provisions in

The language in which rights are couched plays an initial role in ascertaining what legal protections aliens enjoy. For example, the provisions of the United States Constitution that pronounce the rights of *persons*, such as the Bill of Rights, protect citizens and non-citizens alike. However, foreigners will not enjoy protections afforded only to "citizens" such as those contained in the United States¹³⁹ and state¹⁴⁰ citizenship clauses. Similarly, neither foreigner nor simply *naturalized* citizen can serve in the offices of President or Vice-President,¹⁴¹ nor can a non-citizen be a member of either house of Congress.¹⁴² The Constitution does not expressly deny non-citizens the right to vote; rather, it leaves that decision to the states. However, every state has decided not to enfranchise non-citizens.¹⁴³ Indeed, the Constitution appears to *presume* disenfranchisement of non-citizens as the provisions that mandate non-discrimination with regard to the right to vote refer to "citizens of the United States."¹⁴⁴

Similarly, the language of federal legislation provides a signpost with respect to whether non-citizens are entitled to certain legal protections. For example, the Civil Rights Act of 1870¹⁴⁵ grants

the Bill of Rights applicable to the States, foreigners enjoy the rights contained in these provisions not only as against federal regulation but also as against state regulation.

139. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

140. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

141. U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . ."); U.S. CONST. amend. XII ("no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.").

142. U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . ."); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States . . .").

143. See RESTATEMENT, *supra* note 137, at § 722, Comment c ("States may, therefore, deny aliens the right to vote and to hold public office . . . and apparently all States do.").

144. See, e.g., U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account or race, color or previous condition of servitude."); U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. CONST. amend. XXIV (right of citizens to vote in primaries); U.S. CONST. amend. XXVI (right of citizens 18 years of age or older to vote).

145. 42 U.S.C. §§ 1981 *et seq.* (1994). Section 1983 permits a civil action for deprivation of rights under color of state law.

basic civil rights to *persons*, thus including citizens and non-citizens. Likewise, the Civil Rights Act of 1964,¹⁴⁶ and the Civil Rights Act of 1991¹⁴⁷ extend their protections to *persons*. Finally, the provisions providing criminal penalties for civil rights violations also refer to persons.¹⁴⁸

On the other hand, some statutory provisions plainly limit non-citizens' rights, particularly in access to certain professions and political participation. For example, non-citizens are precluded from service on grand and petit juries,¹⁴⁹ from commissioned appointments to the armed services¹⁵⁰ or the merchant marine,¹⁵¹ from obtaining a communications license,¹⁵² or from service as national bank director.¹⁵³ Perhaps forecasting the current welfare reform proposals, legislation provides that a non-citizen's absence from the United States for a mere six consecutive months is grounds for suspension of social security payments.¹⁵⁴

The newest welfare reform law is staggering in its limitation of benefits to non-citizens. For one, the plan signed by President Clinton includes provisions that curtail *legally present* non-citizens' qualification for social security, AFDC and food stamps.¹⁵⁵ Congressional efforts had been even more restrictive than the law put into place.¹⁵⁶ An extreme example of the current nativistic climate is a proposed constitutional amendment to change the established

146. 42 U.S.C. §§ 2000a-2000h (1994) (prohibiting discrimination in public accommodations).

147. Pub. L. No. 102-166, 105 Stat. 1071. This act amended 42 U.S.C. § 1981 *et seq.*

148. 18 U.S.C. § 242 (1994) (providing for criminal penalties for deprivation of rights under color of state law). *See* United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980), *cert. denied*, 454 U.S. 840 (1981) (affirming conviction of border patrol for beating up an illegal entrant).

149. 28 U.S.C. § 1861 (1994).

150. 10 U.S.C. § 532 (1994).

151. 46 U.S.C. § 221 (1994).

152. 47 U.S.C. § 310 (1994).

153. 12 U.S.C. § 72 (1994).

154. 42 U.S.C. § 402(t)(1) (1994).

155. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. IV, 110 Stat. 2105, 2260-77 (to be codified at 8 U.S.C. ch. 14, §§ 1601 - 1645).

156. *See, e.g.*, S. 1795, 103d Cong., 2d Sess. § 601 (1994) (making illegal aliens ineligible for AFDC, SSI, food stamps, Medicaid and Federal unemployment benefits); H.R. 4414, 103d Cong. 2d Sess. §§ 701, 702, 704, 705 (1994) (precluding some aliens from receipt of benefits such as AFDC, SSI, food stamps and Medicaid); H.R. 3500, 103d Cong., 1st Sess. § 601 (1993) (precluding immigrant participation in health and welfare programs including AFDC, SSI, Medicaid, food stamps, and even school lunch and housing programs).

"law of the soil" and deny United States citizenship to children born in the United States to undocumented foreigners.¹⁵⁷

Certainly, welfare reform is not the only area where legislative restrictions have been imposed on both "illegal aliens" and legal ones. A particularly interesting example is the Immigration Reform and Control Act of 1986¹⁵⁸ (IRCA), which provided that even those who were granted legal permanent resident status could have federal benefits withheld.¹⁵⁹ Another provision permitted states to disqualify lawful permanent residents and temporary residents from receiving state benefits.¹⁶⁰

With the obvious differential treatment enjoyed in the United States on the grounds of citizenship, it is important to explore the legal underpinnings and justifications for making such distinctions. Over a century ago in *Nishimura Ekiu v. United States*¹⁶¹ the Supreme Court held that

It is an accepted maxim of international law, that every sovereign nation has the power, as *inherent in sovereignty*, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.¹⁶²

Flowing from this notion, is the principle that the federal government has preemptive, unfettered regulatory power over exclusion of "others/outside" based on the foreign relations power.¹⁶³

157. See 139 Cong. Rec. H1005, H1006-1007 (daily ed. Mar. 3, 1993) (Statement of Rep. Gallegly) ("All persons born in the United States and subject to the jurisdiction thereof, of mothers who are citizens or legal residents of the United States and all persons naturalized in the United States are citizens of the United States and of the State wherein they reside. The first sentence of section 1 of the fourteenth article of amendment to the Constitution of the United States is hereby repealed.") The section of the Fourteenth Amendment that would be repealed reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

158. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

159. 8 U.S.C. § 1255a(h)(1)(A) (1994). The exclusion reached federal financial assistance programs, including AFDC, medical assistance included under the Social Security Act, and food stamps.

160. 8 U.S.C. § 1255a(h)(1)(B) ("(A) State or political subdivision therein may . . . provide that the alien is not eligible for the programs of financial or medical assistance . . .").

161. 142 U.S. 651 (1892).

162. *Id.* at 659 (emphasis added).

163. *Henderson v. Mayor of the City of New York*, 92 U.S. 259, 273 (1875) (state tax scheme imposing head tax on immigrants nullified using commerce clause and emphasizing that regulation of immigrants "is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to

C. Case Law Developments

In this context, it is important to trace the jurisprudence of alienage classifications both in federal and state regulations. It is imperative to distinguish between these two categories because, based upon Congress' plenary power over immigration, courts have developed different review standards for state and federal classifications.¹⁶⁴

1. Federal Regulation

Based upon the primacy of the executive and legislative branches of the federal government in dealing with matters pertaining to foreigners, the judiciary consistently defers to federal regulation and, in almost all cases, has accepted as permissible federal alienage classifications. Over a century ago the Court estab-

be considered and their rights respected, whether the rule be established by treaty or by legislation"); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (shipmaster bond to be posted only by those designated by the California Commissioner of Immigration such as lunatics, paupers, probable public charges, or "lewd or debauched women" stricken by Court which confirms states are precluded from passing laws in matters that implicate foreign relations). For a discussion of the role of the foreign relations power in immigration see Motomura, *supra* note 128. For a discussion of other federal grounds, beyond the foreign relations power, for "continuing the federal primacy of federal preemptory immigration authority", see Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 220, 223 (1984) (listing as other sources the Supremacy Clause, implicating treaty power (U.S. CONST. art. VI, cl. 2); the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3); the Necessary and Proper Clause (U.S. CONST. art. I, § 1, cl. 18); the Uniform Rule of Naturalization Clause (U.S. CONST. art. I, § 8, cl. 4); and the Naturalization Clause (U.S. CONST. art. I, § 8, cl. 4)).

164. See *Mathews v. Diaz*, 426 U.S. 67 (1976). In this case the Court heard a Due Process challenge to 42 U.S.C. § 1395o(2) (1970), a provision that denied eligibility for enrollment in the Medicare SSI program to foreigners unless they had not only been admitted for permanent residence but also had resided in the United States for a minimum of five years. *Id.* at 70. The *Mathews* Court stated that Congress can constitutionally distinguish not only between citizens and aliens, *id.* at 79-80 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."), but also among classes of aliens. *Id.* at 80 ("The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."). The Court concluded that the legislative provision satisfied the rational basis test. *Id.* at 82-83. On the other hand, a state alienage classification has been subjected to strict judicial scrutiny. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (concluding that aliens are "prime example[s]" of a "discrete and insular" group and that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny"). For a critique of this conclusion as an anomaly, see Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591 (1994).

lished this deferential model when it upheld the right of Congress to exclude a foreigner who not only had been lawfully admitted to the United States but who also had been assured of his right to return.¹⁶⁵

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or *from vast hordes of its people crowding in upon us*.¹⁶⁶

A few years later, the Supreme Court stressed this deferential approach confirming that "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance. . . ."¹⁶⁷ In this vein, the Court also has permitted the exclusion of a returning alien without a hearing and on the basis of evidence that is not even made public.¹⁶⁸ The Court affirmed right of Congress to exclude "aliens" by upholding the right of Congress to expel a legally resident alien because of former membership in the Communist party.¹⁶⁹

165. *The Chinese Exclusion Case* (Chae Ching Ping v. United States), 130 U.S. 581, 606 (1889) (congressional act seen as "conclusive upon the judiciary").

166. *Id.* at 603-06 (emphasis added). It is interesting that a century later, as a country we are still fretting about those hordes of "others/outsideers" seeking to crowd us out of our own country. Indeed, a leading scholar has concluded that "[t]he *Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 859 (1987).

167. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (upholding act of Congress allowing deportation of Chinese workers under Chinese Exclusion laws).

168. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210-11 (1953). The Court even stated that if the "alien" could not be deported because there was no country that would receive him, he could then be indefinitely detained. *Id.* at 215-16. The Court recognized the "power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 210.

169. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Two years later, the Court reiterated its position by permitting the expulsion of an "alien" who had been a legal

In 1976 the Court's decision in the watershed case of *Mathews v. Diaz*¹⁷⁰ again exhibited great deference to congressional line-drawing. The *Mathews* Court, faced with a Due Process challenge to a congressional provision distinguishing between classes of "aliens," concluded that it was permissible not only to distinguish between citizens and non-citizens but also between classes of citizens regarding eligibility for Medicare supplemental insurance program. Most recently, in *Sale v. Haitian Centers Council*,¹⁷¹ the Court upheld the exclusion of Haitians by interdicting them on the high seas and returning them to Haiti without even affording them an opportunity to apply for asylum.¹⁷²

To be sure, this broad and long line of cases should not be interpreted to mean that Congress has unfettered power to classify on alienage grounds. In *Wong Wing v. United States*,¹⁷³ the Court concluded that the government could not, without so much as a trial by jury,¹⁷⁴ punish foreigners with hard labor for violating immigration laws. Similarly, the Court invalidated a regulation of the Civil Service Commission barring resident aliens from most positions in the civil service.¹⁷⁵

2. State Regulations¹⁷⁶

In the 1886 case *Yick Wo v. Hopkins*,¹⁷⁷ the Supreme Court held that the equal protection clause barred states from applying laws, which on their face appeared neutral, in such a way so as to ex-

resident for thirty years because of a brief stint as a member of the Communist party. *Galvan v. Press*, 347 U.S. 522 (1954). Significantly, in neither *Galvan* nor in *Harisades* was such political party membership a statutory ground for deportation.

170. 426 U.S. 67 (1976).

171. 509 U.S. 155 (1993).

172. *Id.* The case was decided under the U.S. Refugee Act and the U.N. Refugee Convention.

173. 163 U.S. 228 (1896).

174. *Id.* at 235. The Court apparently rejected the government argument that it was appropriate "to deny the accused [foreigner] the full protection of the law and Constitution against every form of oppression and cruelty to them" simply on the basis of alienage. *Id.* at 239.

175. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). It is a significant aspect of this case that the Court expressly provided that the federal government, based upon its sovereign power, could validly legislate matters that would constitute invalid regulations under the equal protection clause of the Fourteenth Amendment. *Id.* at 100. It is also interesting to note that after this decision the President issued an executive order excluding aliens from the civil service which lower courts upheld.

176. In light of the different constitutional standards of review of federal and state alienage legislation, it is interesting to note that many of the landmark cases pertain to New York statutory provisions.

177. 118 U.S. 356, 373-74 (1886).

clude a foreigner from a "harmless and useful occupation on which [s/he] depend[ed] for a livelihood."¹⁷⁸ In *Yick Wo*, the Court conclusively held that foreigners were *persons* for purposes of the Fourteenth Amendment.¹⁷⁹ Three decades later, the Court reiterated this sentiment by asserting that "it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."¹⁸⁰

In its 1971 landmark *Graham v. Richardson* decision, the Supreme Court ruled that states' alienage-based classifications are "inherently suspect and subject to close judicial scrutiny."¹⁸¹ Consequently, any alienage classification, to pass constitutional muster, must "withstand [a] stringent examination [or] cannot stand."¹⁸² The *Graham* decision is the basis of numerous findings that states cannot discriminate against non-citizens, including preventing foreigners from engaging in the legal¹⁸³ or engineering¹⁸⁴ professions, or from being notaries public.¹⁸⁵

178. *Id.* at 374.

179. *Id.* at 369.

180. *Truax v. Raich*, 239 U.S. 33, 41 (1915) (striking Arizona law requiring businesses to maintain work force of at least 80% citizens or aliens who declared intent to become naturalized citizens). The Court found that "to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the [S]tate would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by admission, would be segregated in such of the States as chose to offer hospitality." *Id.* at 33. Thus, the Court's invalidation of the state limitation is based, in part, on a preemption analysis that notes the state's rule has an impermissible impact on the control of immigration, a matter solely within the federal government's province.

181. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (invalidating Arizona and Pennsylvania laws imposing state laws citizenship and residency requirements for welfare because such laws encroached on federal power, and holding that aliens are entitled to protection as a suspect class under the Equal Protection Clause of the Fourteenth Amendment).

182. *Nyquist v. Mauclet*, 432 U.S. 1, 6 (1977) (New York statute barring all aliens who do not satisfy statutory terms from assistance programs for students pursuing higher education violated Fourteenth Amendment's equal protection's guarantee).

183. *In re Griffith*, 413 U.S. 717 (1973) (invalidating Connecticut statute prohibiting non-citizens from sitting for the bar exam).

184. *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976) (invalidating Puerto Rico statute limiting right of resident aliens from engaging in civil engineering).

185. *Bernal v. Fainter*, 467 U.S. 216 (1984) (holding that Texas could not constitutionally prohibit resident aliens from becoming notaries public).

This is not to say that states can never classify persons on the basis of alienage. To the contrary, in *Sugarman v. Dougall*,¹⁸⁶ the Court recognized the relevancy of alienage in constitutional decision-making, noting that the state's (here, New York's) interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'" justified considerations of alienage. The basis for the constitutional relevance of alienage classifications was the states' traditional and constitutional authority to specify voter qualifications and the qualifications of "elective or important non-elective executive, legislative and judicial positions [held by] officers who participate directly in the formulation, execution, or review of broad public policy"¹⁸⁷ Although the state law under scrutiny was stricken, the Court's dictum laid the groundwork for later constitutionally permissible limitations.

Four years later in *Nyquist v. Mauclet*,¹⁸⁸ the Court declared unconstitutional another New York law—one that prohibited resident aliens from receiving financial assistance in higher education.¹⁸⁹ *Mauclet*, however, with a slim 5-4 majority, is a signpost in alienage classification decisions marking the start of a retrenchment from the *Graham* standard.¹⁹⁰

Finally, in *Plyler v. Doe*,¹⁹¹ a 1982 landmark decision, the Court invalidated a Texas statute that not only withheld state funds for

186. 413 U.S. 634, 642 (1973). *Sugarman* presented a challenge to section 53 of the New York Civil Service law, which provided that only United States citizens could hold permanent positions in the competitive class of the state civil service.

187. *Id.* at 647. However, here, the Court looked at the substantiality of the State's interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is enforced. *Id.* The Court concluded that § 53 violated the Equal Protection Clause of the Fourteenth Amendment and that it did not "withstand the necessary close scrutiny" because it was not supportable that employment of aliens would be inefficient, as the state would incur costs to train replacements for aliens who left the state's employ. *Id.* at 642.

188. 432 U.S. 1 (1977).

189. The stated statutory purpose for enacting the law was "to provide the broad range of leadership, inventive genius, and source of economic cultural growth for oncoming generations," *id.* at 10, n.13 (quoting 1961 N.Y. Laws, ch. 389, § 1(a)), which purpose the majority concluded would equally be served by including resident aliens in the assistance programs. *Id.* at 11.

190. The main difference between the majority and the dissent was the former's perception of the utility of "aliens" in American society. *Id.* at 4 (quoting *Griffiths*, 413 U.S. at 722) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.").

191. 457 U.S. 202 (1982). Many argue that *Plyler* is clear precedent on the unconstitutionality of Proposition 187. See, e.g., Kristen M. Schuler, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275 (1996); Michael Scaperlanda, *Partial Membership: Aliens and the Constitu-*

the education of undocumented children from local schools, but also permitted local school districts to deny enrollment to such children. The Court reiterated that undocumented foreigners are "persons" for purposes of the Fourteenth Amendment and thus are entitled to the equal protection of the laws.¹⁹² Although the Court invalidated the statute, it held that education is not a fundamental right and that undocumented foreigners are not a suspect class, marking a retreat from *Graham*. Nonetheless, finding that "education has a fundamental role in maintaining the fabric of our society,"¹⁹³ the Court refused to "impose a lifetime hardship on a discrete class of children not accountable for their disabling status" who would be marked by "[t]he stigma of illiteracy . . . for the rest of their lives."¹⁹⁴

It is noteworthy that notwithstanding various rulings invalidating state alienage classifications, the *Sugarman* Court established that alienage is a constitutionally relevant premise. Thus myriad significant rulings have found instances of discrimination against "aliens" to be constitutionally permissible. Many of these decisions reveal a nativistic distrust of foreigners by questioning aliens' loyalty and trustworthiness.

Prior to the *Graham/Plyler* era, the Supreme Court, sounding much like the supporters of Proposition 187 sound today, upheld a New York statute barring employment of aliens on public works projects. The Court stated that

[t]o disqualify aliens is discriminating indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of resources of the State to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its citizens rather than that of aliens. What is a privilege rather than a right, may be dependent upon citizenship.¹⁹⁵

tional Community, 81 IOWA L. REV. 707 (1996); Stuart Bigel, *The Wisdom of Plyer v. Doe*, 17 CHICANO L. REV. 46 (1995); Peter M. Schuck, *Address: The Message of Proposition 187*, 26 PAC. L.J. 989 (1995).

192. *Id.* at 210 (holding that aliens, even "illegal aliens" are persons guaranteed due process of law by the Fifth and Fourteenth Amendments).

193. *Id.* at 221.

194. *Id.* at 223. It is significant that the Court cited international law to support the conclusion as to the importance of education for children. See *id.* (citing article 45 of Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607).

195. *People v. Crane*, 214 N.Y. 154, 161, 164, 108 N.E. 427, 429, 430, *aff'd*, 239 U.S. 195 (1915). But see *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("But this Court

In 1976, more than sixty years later, the Court upheld state law sanctions against employers who hired "illegal aliens,"¹⁹⁶ as well as a state's exclusion of foreigners from state and federal juries.¹⁹⁷

In the years that followed, the Court's decisions in two significant cases presenting challenges to New York laws confirmed and developed the concept of moral/legal relevance of alienage as a classification. In *Foley v. Connelie*,¹⁹⁸ the Court upheld a ban on non-citizens' service in the state police noting that

[t]he decisions of this Court with regard to the rights of aliens living in our society have reflected fine, and often difficult, questions of values. As a Nation we exhibit extraordinary hospitality to those who come to our country, which is not surprising for we have often been described as a 'nation of immigrants.' . . . Our cases generally reflect a close scrutiny of restraints imposed by States on aliens. But we have never suggested that such legislation is inherently invalid, nor have we held that all limitations on aliens are suspect.¹⁹⁹

In a dramatic departure from *Graham's* strict scrutiny standard,²⁰⁰ the *Foley* Court adopted a rational basis test, explaining that "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship'."²⁰¹ Quoting the *Sugarman* dictum that became the green-light to alienage discrimination, the Court stated that "our scrutiny will not be so demanding where we deal with matters firmly within a State's

now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'").

196. *De Canas v. Bica*, 424 U.S. 351 (1976) (state program barred from employment all aliens except those with permission to work in the country permissible as it furthers a legitimate state goal).

197. *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976) (summary affirmance of district court opinion upholding exclusion of foreigners from service on grand and petit juries where citizenship requirement was deemed based on a compelling governmental interest).

198. 435 U.S. 291 (1978) (rejecting equal protection challenge to New York Executive Law § 215(3), which prohibited appointment of non-citizens to the New York State police force).

199. *Id.* at 294 (footnote omitted).

200. See Harold Hongju Koh, *Equality With A Human Face: Justice Blackmun And The Equal Protection Of Aliens*, 8 HAMLINE L. REV. 51, 74 n.114 (1985) (for a collection of lower court cases applying a strict scrutiny level of review to invalidate state alienage classifications).

201. *Foley*, 435 U.S. at 295 (quoting *Nyquist v. Mauclet*, 432 U.S. at 14 (Burger, C.J., dissenting)).

constitutional prerogatives.”²⁰² Concluding that the function of a police officer is not one of “the common occupations of the community”²⁰³ but rather one that requires “execution . . . of public policy”, the Court held that it was appropriate to exclude aliens from the police.²⁰⁴ As a commentator has noted

Foley’s result did not loosen the carefully maintained narrowness of the political community exception nearly as much as *Foley’s* majority opinion . . . [which] stepped away from the original purposes of the exception and subtly shifted its focus . . . [from] an historical inquiry into whether a state had traditionally reserved a particular nonelective office for its citizens as a matter of constitutional prerogative[] out of a conscious desire to give greater meaning to state citizenship [to an] invit[ation to] judges to engage in abstract, result-oriented inquiries into whether particular public jobs involved *some* measure of discretion or carried out *some* aspect of public policy.²⁰⁵

These emerging subjectivities in the Court’s approach to alienage classifications presage the shifting jurisprudence.

In *Ambach v. Norwick*,²⁰⁶ decided a year after *Foley*, the Court upheld New York’s exclusion of non-citizens from teaching in public schools.²⁰⁷ The majority concluded that the state was entitled to question the qualifications²⁰⁸ and loyalty²⁰⁹ of foreigners as a group.²¹⁰ Again applying the *Sugarman* dictum, the Court con-

202. *Id.* at 296 (quoting *Sugarman*, 413 U.S. at 648).

203. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

204. The Court viewed the police function as an important nonelective office that should fall within *Sugarman’s* political community exception, emphasizing the discretionary powers of police officers, such as power to arrest, to justify that the functions of state troopers are central to the functions of state government and thus could only be carried out by citizens. *Foley*, 435 U.S. at 302 (Blackmun, J., concurring).

205. Koh, *supra* note 200, at 77-78.

206. 441 U.S. 68 (1979) (*Ambach* also concerned the proper parameters of state regulation of the employment of foreigners.).

207. This challenge was presented by two school teachers each of whom was married to an American citizen. A three judge district court had invalidated the statute applying a strict scrutiny standard, but the Court, applying only a rational basis test, reversed. The Court concluded that “[p]ublic education, like the police function, ‘fulfills a most fundamental obligation of government to its constituency.’” *Id.* at 76 (quoting *Foley*, 435 U.S. at 297).

208. *See id.* at 81 n.14 (New York could presume “that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens.” (emphasis added)).

209. *Id.* at 80-81 (noting aliens’ “primary duty and loyalty” to another sovereign).

210. A similar loyalty argument failed as an “impermissible presumption” when used to establish that a *naturalized* citizen is likely to be less loyal than a native-born citizen. *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (invalidating, as “so unjustifiable

cluded that "[p]ublic education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'" ²¹¹

Cabell v. Chavez-Salido,²¹² a final case worthy of mention in this line of decisions, upheld the propriety of a state's exclusion of foreigners from service as peace officers, a category that included deputy probation officers.²¹³ The Court concluded that the peace officer position satisfied *Sugarman's* two-tiered alienage classification test²¹⁴ as it was neither over- nor under-inclusive and the position was one that included discretionary powers giving substance to democratic self-governance.

Significantly, not all the Justices were comfortable with the jurisprudential inconsistency of alienage decisions after these cases. Indeed, Justice Stewart in *Foley* confessed "that it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions."²¹⁵ To be sure, it is, at best, difficult to reconcile the differences between public service, law practice, engineering, and public assistance in higher education on the one hand and public teachers, police officers, and probation officers, on the other. Indeed, one *Ambach* dissenter, Justice Blackmun, showed frustration with the decision's failure to recognize foreigners' historic contributions and admonished the majority for "disregarding some of the diverse ele-

as to be violative of due process" a section of the INA that deprived naturalized citizens of United States nationality if the naturalized citizen resided for more than three years in their country of origin). There is, however, room to question this loyalty concept further. Why, for example, other than loyalty concerns would the Constitution prohibit naturalized citizens from serving as President or Vice-President of the republic? Conversely, if soil birth is the stand-in for loyalty and patriotism, on what basis can the Congress seek to invalidate birth citizenship solely on the basis of parents' status? These inconsistencies lead one to believe that there is something more than soil birth at work that results in the presuppositions that courts seem to accept, on their face, as established truths.

211. *Ambach*, 441 U.S. at 76 (quoting *Foley*, 435 U.S. at 297).

212. 454 U.S. 432 (1982).

213. *Id.* (upholding California exclusion *vis à vis* the application of three permanent resident aliens who had applied for positions as deputy probation officers and who were willing to swear loyalty to the state and federal constitutions).

214. The first question should be whether the classification was "substantially over-inclusive or underinclusive." *Id.* at 440. This should be followed by asking about the specific job category, to wit, "the importance of the function as a factor giving substance to the concept of democratic self-government." *Id.* at 440-41 n.7.

215. *Foley*, 435 U.S. at 300 (Stewart, J., concurring) (adding that he joined the Court "only because I have become increasingly doubtful about the validity of those decisions . . .").

ments that are available, competent, and contributory to the richness of our society and of the education it could provide."²¹⁶

This inconsistent jurisprudence is of particular significance in light of this country's current nativistic climate. Failure to recognize how foreigners—even undocumented ones—can, and do, contribute to the richness of society results in the absence of a counterbalance to xenophobic initiatives, reinforces unhealthy isolationism, and very likely derogates from established human rights norms.

Foley, Ambach and Cabell render it difficult, if not impossible, constitutionally to invalidate any state or federal alienage classification, with the possible exception of state provisions that are preempted by federal plenary power over immigration and foreign policy.²¹⁷ Thus it is important to explore an existing body of human rights laws, namely international human rights norms, to ascertain whether states in any way are, or can be, limited in crafting alienage classifications.

V. International Protections of Aliens

The foundation of the intimate relationship between international law and the law of alienage is the "accepted maxim of international law" that the inherent sovereignty of nations forms the basis of a nation's right to pick and choose who will be allowed to enter its "dominion."²¹⁸ In 1972²¹⁹ the Supreme Court announced that the United States' power to exclude foreigners was based upon "ancient principles of the international law of nation-states."²²⁰ However, a commentator's historical analysis reveals that "[t]he proposition . . . is of recent origin."²²¹ Rather, even in

216. 441 U.S. at 88 (Blackmun, J., dissenting).

217. In *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), the court invalidated substantial portions of Proposition 187 on federal preemption grounds.

218. It is an accepted maxim of international law, that every sovereign nation has the power, as *inherent in sovereignty*, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (emphasis added).

219. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

220. *Id.* at 765.

221. James A. R. Nafziger, *The General Admission Of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 807 (1983) (noting that "[b]efore the late 19th century, there was little, in principle, to support the absolute exclusion of aliens" and that "Biblical injunctions, which influenced the articulation of international law by 17th- and 18th-century publicists, favored free transboundary movement") (citations omitted).

view of "[t]he Westphalian system of nation-states [that] complicate[s] the free movement of persons by confirming more rigid territorial boundaries . . . the classic publicists, faced with a new tension between traditional freedom of movement and the emerging concept of the sovereign state, denied the state an absolute right to exclude aliens."²²² In fact, an early New York decision implied a policy of open borders.²²³

Notwithstanding this history, a sovereign right to exclude, at least within constitutionally permissible parameters, is not subject to dispute. An intersection exists, however, between this sacrosanct sovereign power and human rights norms, which, at least in principle, can create limitations on the exercise of sovereign power possibly even within the context of a State's "constitutional" parameters.

The initial inquiry in evaluating the role of international human rights norms on an alienage analysis, and whether such norms can effectively limit notions of sovereignty, is whether the norms are merely aspirational statements of moral goals or positive rules creating binding and legally enforceable rights and obligations—an inquiry that lies at the heart of a centuries-old debate.²²⁴

International human rights, simply stated, are fundamental and inalienable rights, essential to life as human beings.²²⁵ These norms are ethical, social and political rights that concern the respect and dignity associated with individuals (as opposed to states) and have their origin in "natural law [and] in contemporary moral values."²²⁶ This conception of international human rights law recognizes that persons possess rights with which the state cannot in-

222. *Id.* at 810 (noting that Grotius listed among "things which belong to Men in Common" certain rights of foreigners). *See also id.* at 811 (noting that Francisco de Vitoria argued that freedom to migrate freely existed; Christian Wolf articulated a principle of free movement; and Pufendorf "similarly denied to the sovereign a right to exclude aliens"). *But see id.* at 812 (Vattel recognizes "[t]he sovereign may forbid entrance of his territory either to foreigners in general, or in particular cases . . . flow[ing] from the rights of domain and sovereignty").

223. *Lynch v. Clarke*, 1 Sand. Ch. 583, 661 (N.Y. Ch. 1844) (noting that "[t]he policy of our nation has always been to bestow the right of citizenship freely, and with a liberality unknown to the old world. I hold this to be our sound and wise policy.").

224. *See*, LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 10-26 (3d ed. 1993) (commentary of key figures and discussion of principles and doctrines in the debate over the legitimacy of international law) (examining the theoretical framework of international law and human rights).

225. REBECCA M. WALLACE, *INTERNATIONAL LAW* 176 (1986).

226. RESTATEMENT, *supra* note 137, at pt. VII, ch. 1, comment b; HENKIN, *supra* note 224, at ch. 8. *See generally* FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* (1990).

terfere and that the state must affirmatively recognize, respect and protect.²²⁷

Human rights obligations of states transcend not only geographic borders but also nationality, a consideration of paramount importance when focusing on alienage classifications. Human rights are defined and protected by international law.²²⁸

A fundamental source of states' resistance to acknowledging the existence of such legally enforceable human rights, is the requisite correlative concession that there exists a limitation on the sovereign power of government: a crack in states' sacrosanct sovereignty²²⁹ armor—the very coat of arms that supposedly grants the state the unfettered *right* to exclude foreigners. The obligation to respect inalienable human rights thus becomes a paradox: the supremacy of the state is limited by human rights norms which then become *supra*-sovereign.

This threshold issue of State sovereignty that forms the basis of the claim to a government's purported unfettered power to legislate at first glance appears to create an insurmountable obstacle to any challenge of domestic strictures—such as a government's right to exclude whomever it chooses to exclude. Were unfettered power the true import of sovereignty any State or federal legislation would have to be deemed a legitimate exercise of sovereign power.²³⁰ The Achilles heel of this analysis is that, in dealing with human rights norms, the focus is on *individuals* whose rights are non-derogable and thus not subject to a State's sovereign whim. Indeed, if the Nuremberg Trials stand for anything, it is the basic

227. RESTATEMENT, *supra* note 137, at pt. VII, Introductory Note. See, e.g., International Covenant on Civil and Political Rights, art. 2, sec. 1, 999 U.N.T.S. 173, adopted by the U.N. General Assembly on Dec. 19, 1966, G.A.Res. 2200, entered into force Mar. 23, 1976, ratified by the United States June 8, 1992 [hereinafter ICCPR] ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ."); Vienna Declaration and Programme of Action, A/CONF.157/23 (July 12, 1993), para. 1 ("Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.").

228. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 176 (2d ed. 1993).

229. Sovereignty is defined as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed; . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation . . ." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

230. One *domestic* exception not wholly relevant to the international legal analysis, of course, is that instance in which the exercise of power by a state is in contravention of the federal government's plenary or supreme power.

tenet that there is no such thing as a State's unfettered sovereign existence when it comes to human rights violations.²³¹

In fact, the aftermath of Nazi atrocities, which included the killing of German Jews on German soil by Germans, resulted in a shift in philosophy from the positivists' doctrinal view that only States can be subjects of international law.²³² The contemporary view recognizes not only that persons have to be protected from States notwithstanding existing principles of sovereignty,²³³ but also that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."²³⁴ The nations of the world joined to form the United Nations for the purpose of "promoting and encouraging respect for human rights and for fundamental freedoms for all"²³⁵ In this view, it can hardly be disputed that international human rights law is *real* law, and that it *does* constitute a limitation on State sovereignty.

Nuremberg placed fundamental human rights—rights from which no state may derogate, even *vis à vis* its own citizens and within its own geographic borders—at the heart of international law.²³⁶ These trials not only defined the relationship of individuals to international law but also conclusively established that the rules of public international law should, and do, apply to individuals.²³⁷ In this regard, international human rights agreements have created obligations and responsibilities for states in respect of all individuals subject to their jurisdiction, including their own nationals.²³⁸ Thus, at least starting with *Nuremberg*, the concept of sovereignty has evolved (and continues to change) in a manner that is increasingly inhospitable to a human rights exception.

231. The Nuremberg Trial, 6 F.R.D. 69 (1946) (the trial passed judgment on some of those responsible for Nazi war crimes and crimes against humanity).

232. A full history of the development of international human rights laws is beyond the scope of this chapter. For comprehensive coverage of the subject, see LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* (1968); MYRES MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980); LOUIS SOHN & THOMAS BUERGENTHAL, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).

233. See generally NEWMAN & WEISSBRODT, *supra* note 226, at 1.

234. *Nuremberg Trial*, 6 F.R.D. at 110.

235. U.N. CHARTER art. 1, ¶ 3. See generally *Nuremberg Trial*, 6 F.R.D. 69.

236. See generally *Nuremberg Trial*, 6 F.R.D. 69.

237. *Nuremberg Trial*, 6 F.R.D. at 110.

238. U.N. CHARTER arts. 55, 56. See, e.g., ICCPR, *supra* note 227, at art. 2 § 1 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant").

To be sure, the U.N. Charter itself recognizes the sovereignty, territorial integrity and political independence of States.²³⁹ However, academics have posited that the very notion and the role of the State in international law requires some rethinking.²⁴⁰ One of the leading international law scholars has urged the recognition that the "carapace of national sovereignty begins to dissolve" in international human rights law.²⁴¹

An articulation of the doctrine that results from the evolution of the sovereignty principles would posit that a State can use sovereignty neither as a shield from accountability for the way it treats individuals—citizens and non-citizens alike—and from the implementation and enforcement of those norms nor as a sword to eviscerate the very human rights precepts (or at least the application of the norms) to which it is bound. Professor Louis Henkin, a pre-eminent international human rights scholar, recognizing both the evolution of sovereignty theory and the tension between sovereignty principles and humanitarian "impulse to aid" in refugee law—where the issue of sovereign right to exclude is central—has suggested an approach consistent with the premise urged above.²⁴² He concludes that "[t]he international community should reject by its refugee law, as it has by its human rights law generally, the notion that states maintain exclusive power over entry and presence in their territory as the very essence of their national sovereignty."²⁴³

One of the central themes of human rights doctrine is the equality of all persons without distinction as to "race, color, sex, language, religion, political or other opinion, national or social origin,

239. U.N. CHARTER, art. 2, § 1 (recognizing "sovereign equality of all its Members"); § 4 (forbidding force or threat of force by members "against the territorial integrity or political independence of any state"). It is significant that in recent history it was only after this provision was raised that the Security Council authorized the taking of certain measures to protect the Kurdish in Iraq. See U.N. Doc. S/Res/688 (1991).

240. See, e.g., J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 10 (1991).

241. Thomas J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 127 (1991). See also W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990) (positing that the "venerable term 'sovereignty'" is undergoing a "contemporary change in content").

242. See Louis Henkin, *An Agenda for the Next Century: The Myth and Mantra of the State Sovereignty*, 35 VA. J. INT'L L. 115, 116 (1994).

243. *Id.* at 118.

property, birth or other status."²⁴⁴ This vision of and mandate for equality is at the root of and echoed by every single international and regional human rights convention.²⁴⁵ Therefore, domestic laws enacted under the guise of unfettered sovereignty cannot absolve discrimination and inequality that derogates from human rights of individuals simply because it is done in the name of law.

Alienage classifications are the quintessential exercise of sovereign power: to exclude whomever a state wishes to keep out of its domain. However, while the United States as a nation may well be free to control immigration and to classify on the basis of alienage, few will argue that it is free to effect exclusions solely on the basis of race, religion²⁴⁶ or even sex.²⁴⁷

It is significant to any discussion of alienage-based rights that in preparing international human rights documents the drafters, much like the "founding fathers" of our republic, saw it fit to provide the rights embodied in the documents to *persons*, rather than the narrower class of citizens.²⁴⁸ In fact, the ICCPR's *travaux*

244. Universal Declaration of Human Rights, G.A. Res. 71, U.N. GAOR, 3d Sess., art. 17, ¶ 2, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration] (a stated purpose of the United Nations was "to achieve international co-operation . . . in promoting and encouraging respect for human rights and fundamental freedoms for all persons"). See also U.N. CHARTER arts. 55, 56.

245. See, e.g. ICCPR, *supra* note 227, at art. 4. In fact, it is deemed so important that the ICCPR prohibits discrimination by States on the proscribed grounds even in times of officially proclaimed public emergencies "which threaten[] the life of the nation." *Id.* (footnote omitted).

246. Henkin, *supra* note 166, at 863 (noting that "even plenary power is subject to constitutional restraints" and commenting that "I cannot believe that the Court would hold today that the Constitution permits either exclusion on racial or religious grounds . . ."); RESTATEMENT, *supra* note 137, at § 702, comments i (systematic racial discrimination), j (systematic religious discrimination), and n (customary law of human rights and *jus cogens*), noting that prohibitions against, *inter alia*, systematic racial and/or religious discrimination, are *jus cogens*.

247. Although the Restatement does not include sex as a peremptory norm, RESTATEMENT, *supra* note 137, at Comment n (listing only clauses (a) to (f) as peremptory norms, with gender discrimination being listed at clause (l)), recent developments including pronouncements on the Haiti atrocities, actions of the War Crimes Tribunal in former Yugoslavia, and United Nations Conferences ranging from the ICPD, to the Social Summit, to the Fourth World Conference on Women tend to indicate that a prohibition on gender based discrimination should be deemed *jus cogens*. This author cannot believe that a Court would today hold that blanket exclusion on the basis of sex, or ethnicity for that matter—were it to be differentiated from race, would be constitutionally permissible.

248. ICCPR, *supra* note 227, at arts. 2(1), 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 2, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force on Jan. 3, 1976) [hereinafter Economic Covenant] ("The State Parties to the present Covenant undertake to guarantee

préparatoires indicate the rejection of a proposed amendment to substitute the word "citizens" for the word "persons".²⁴⁹ Thus, the *travaux préparatoires*, the language of the ICCPR, which itself uses the term citizens only in one article (25), as well as general comments of the Human Rights Committee (HRC) confirm that a broader definition of "persons"—one that includes aliens—is warranted in the interpretation of the categories of individuals entitled to enumerated rights.²⁵⁰

Of particular importance in an interpretive analysis are the Comments of the Human Rights Committee, specifically with respect to

that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."). *See also id.* at Preamble (referring to "human beings"); *id.* at art. 1 (referring to "peoples"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 212 U.N.T.S. 221 [hereinafter European Convention] ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."); *id.* at arts. 2, 5, 8, 9, 10 (using the term "everyone" to denote who possesses the enumerated rights respectively, to life; liberty and security of the person; private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression); American Convention on Human Rights, Nov. 22, 1969, art. 17, O.A.S.T.S. No.36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/11/23 rev.2 (1970), reprinted in 9 I.L.M. 673 (1970) (entered into force July 18, 1978) at art. 1 [hereinafter American Convention] ("The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons* subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.") (emphasis added); *id. passim* (document refers to persons to designate those entitled to enjoyment of enumerated rights); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, Preamble, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) (entered into force Jan. 4, 1969) [hereinafter Race Convention] (race, sex, language or religion). *But see id.* at art. 1 (2),(3) (Race Convention does not apply to distinctions between citizens and non-citizens but although states may have legal provisions affecting nationality, citizenship or naturalization "such provisions [can] not discriminate against any particular nationality"); Charter of the Organization of American States, Apr. 30, 1948, art. 3, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607 (entered into force Feb. 27, 1970) [hereinafter OAS Charter] (race, nationality, creed or sex); *id.* art. 15 (states with equal jurisdiction over nationals and aliens).

249. U.N. Doc. A/C.3/SR.1103 § 38 (1961). During the process of drafting and adopting Article 27 of the ICCPR, India proposed such an amendment.

250. *But see* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 171-72 (1991) (noting that it "seems to be that aliens are *prima facie* excluded [from the protection of Article 27] for a number of reasons . . ." and citing to the *travaux* as confirmation that the protections only go to citizens).

the position of aliens under the ICCPR.²⁵¹ The HRC notes that "[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."²⁵² The HRC continues:

Thus the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.²⁵³

The HRC has admonished that "[i]n certain cases . . . there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens."²⁵⁴ Indeed, the Committee recognizes that if the ICCPR's protections were observed *vis à vis* aliens, their "position . . . would thus be considerably improved."²⁵⁵ Moreover, while recognizing that the ICCPR "does not recognize the right of aliens to enter or reside in the territory of a State party," which decision remains a State prerogative, the HRC nevertheless urges that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."²⁵⁶

It is significant that in addressing specific rights of aliens under the ICCPR the HRC provided thus:

[Aliens] may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They

251. General Comments of the Human Rights Committee, General Comment 15 (27th Sess., 1986) [hereinafter HRC General Comments], reprinted in M. CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE* (1994).

252. *Id.* ¶ 1.

253. *Id.* ¶ 2. The paragraph continues "[e]xceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports show that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant." *Id.*

254. *Id.* ¶ 3. In this paragraph the HRC recognizes that state constitutions differ with respect to providing for the equality of aliens with citizens and notes that although in some states fundamental rights are "not guaranteed to aliens by the Constitution or other legislation, [such rights] will also be extended to them as required by the Covenant." *Id.*

255. *Id.* ¶ 4.

256. HRC General Comments, *supra* note 251, ¶ 5.

have the right to freedom of thought, conscience and religion, and the right to hold opinions and express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. . . . Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights²⁵⁷

Thus the message is unambiguous. The clear intent is for human rights treaties to afford protections to all persons—aliens and citizens alike.

Beyond conventional norms, rights of non-citizens to equality is well-grounded in customary norms. There is broad consensus that the Universal Declaration of Human Rights²⁵⁸ ("Declaration" or "Universal Declaration") is binding on States as customary law of nations. Consequently, States are bound by its equality clause, which provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."²⁵⁹ Sections of the Declaration that are custom create independent, positive, domestically enforceable individual rights.²⁶⁰

257. *Id.* ¶ 7. For a discussion on whether aliens are "minorities" under the ICCPR or other international documents, see Natan Lerner, *The Evolution of Minority Rights in International Law*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77, 81 (Catherine Brölmann et al. eds., 1993) ("Aliens shall not be considered as minorities or identified groups, in principle. Though, in some cases, groups of aliens of a single origin, or related by cohesive elements such as language or religion, will find themselves in a position that has elements in common with the notion of minorities. They may even become, in the course of time, real minorities. They are, of course, entitled to enjoy full human rights and in some conditions, the benefits of special measures to ensure their identity as a group."); Rüdiger Wolfrum, *The Emergence of "New Minorities" as a Result of Migration in PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 153 (Catherine Brölmann et al. eds., 1993) (discussing application of article 27 of the ICCPR to aliens or citizens); THORNBERRY, *supra* note 250, at 171 (noting that it "seems to be that aliens are *prima facie* excluded [from the protection of Article 27] for a number of reasons . . .").

258. G.A. Res. 217A(11), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

259. Universal Declaration, *supra* note 244, at art. 2. See also *id.* at art. 7 (all are equal before the law).

260. This will be the case even if the identical rights might not be enforceable as conventional law because they are contained in documents that have not been ratified or have been declared to be non-self executing.

There are also specific rights grounded in the various international documents that are pertinent in an inquiry pertaining to alienage rights. The various instruments protect the international human rights to mental and physical health,²⁶¹ to education,²⁶² to freedom from interference with privacy and family,²⁶³ to liberty and security of the person,²⁶⁴ to travel,²⁶⁵ to information,²⁶⁶ and to freedom of association.²⁶⁷ Article 24 of the ICCPR provides a special protection for children mandating that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a mi-

261. Economic Covenant, *supra* note 248, at art. 12 ("right of everyone to the enjoyment of the highest attainable standard of physical and mental health"); Universal Declaration, *supra* note 244, at art. 25; Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., at art. 12, U.N. Doc. A/34/46 (1979) [hereinafter Women's Convention]; Convention on the Rights of the Child, G.A. Res 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989) [hereinafter Child Convention], *reprinted in* 28 I.L.M. 1448 (1989); African Charter on Human and People's Rights, art. 16, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter].

262. Universal Declaration, *supra* note 244, at art. 26 ("Everyone has the right to education."); Economic Covenant, *supra* note 248, at art. 13; Women's Convention, *supra* note 261, at art. 10; OAS Charter, *supra* note 248, at art. 47 (states have to ensure effective exercise of right to elementary education for school age children); Child Convention, *supra* note 261, at art. 28; African Charter, *supra* note 261 at art. 17; Race Convention, *supra* note 248, at art. 5; Convention Relating to the Status of Refugees, Apr. 22, 1954, art. 22, 189 U.N.T.S. 137 (refugees to be given same treatment as nationals regarding elementary education).

263. Universal Declaration, *supra* note 244, at art. 12; ICCPR, *supra* note 227, at art. 17; Child Convention, *supra* note 261, at art. 16; American Convention, *supra* note 248, at art. 11; European Convention, *supra* note 248, at art. 8.

264. Universal Declaration, *supra* note 244, at art. 3; ICCPR, *supra* note 227, at art. 9 ("Everyone has the right to liberty and security of the person . . . [n]o one shall be deprived of his[her] liberty except on such grounds and in accordance with such procedure as are established by law."); Race Convention, *supra* note 248, at art. 5; African Charter, *supra* note 261, at art. 6; American Convention, *supra* note 248, at art. 7; European Convention, *supra* note 248, at art. 5.

265. Universal Declaration, *supra* note 244, at art. 13; ICCPR, *supra* note 227, at art. 12 (limited to those "lawfully within the territory of a State"); Race Convention, *supra* note 248, at art. 5; American Convention, *supra* note 248, at art. 22 (limited to "person lawfully in the territory . . .").

266. Universal Declaration, *supra* note 244, at art. 19; ICCPR, *supra* note 227, at art. 19; Race Convention, *supra* note 248, at art.5; Child Convention, *supra* note 261, at art. 13; African Charter, *supra* note 261, at art. 9; American Convention, *supra* note 248, at art. 13; European Convention, *supra* note 248, at art. 10.

267. Universal Declaration, *supra* note 244, at art. 20; ICCPR, *supra* note 227, at art. 22; Race Convention, *supra* note 248, at art.5; Child Convention, *supra* note 259, at art. 15; African Charter, *supra* note 261, at art. 10; American Convention, *supra* note 248, at art. 16; European Convention, *supra* note 2488, at art. 11.

nor, on the part of his family, society, and the State." And finally, Article 27 provides that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their language."²⁶⁸ These sources of specific rights, as incorporated into our domestic discourse, provide ample and powerful bases at least to limit, if not to condemn and invalidate, xenophobic or otherwise discriminatory state or federal anti-alien initiatives.

To ascertain the usefulness of international human rights law as the framework within which to mount a challenge to alienage-based classifications it is imperative to review how international law fits into United States domestic law and policy. The United States Constitution and American Jurisprudence, including statutes²⁶⁹ recognizing the existence of the law of nations, provide a useful guide.

That international law is part of the domestic law of the United States is not open to question. The Constitution itself expressly recognizes the existence of international law and articulates the role of the different branches of government.²⁷⁰ As in the international sphere, treaties,²⁷¹ which the Constitution makes the supreme law of the land,²⁷² are one of the sources of international

268. This provision is replicated in the Child Convention, *supra* note 261, at article 30, specifically with respect to the rights of children belonging to "ethnic, religious or linguistic minorities or . . . of indigenous origin"

269. See, e.g., Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.") (emphasis added).

270. See, e.g., U.S. CONST. art. I, § 8, cl. 10 ("The Congress shall have Power . . . [t]o define and punish . . . [o]ffenses against the Law of Nations").

271. The Restatement defines treaties as agreements between two or among more states or international organizations that are "intended to be legally binding and governed by international law." RESTATEMENT, *supra* note 137, at § 301(1). This definition closely parallels that of the Statute of the International Court of Justice. Technically, these agreements create obligations that are binding only between or among the contracting states and, thus, are a source of law only with respect to such parties. However, multilateral agreements open to all states are increasingly viewed as statements of generally accepted principles of international norms. These agreements also are used for developing and codifying customary law as in the Vienna Convention on the Law of Treaties. *Id.* at § 102, cmt. f. In the international field, as in this chapter, the terms treaty, convention and agreement are used interchangeably.

272. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

law. The Constitution requires that treaties, which are the province of the executive, be passed with the advice and consent of two-thirds of the Senate.²⁷³

In addition to the constitutionally mandated acceptance of treaty law as domestic law, it is well-settled that the United States law recognizes the binding nature of custom²⁷⁴ as a source of international law,²⁷⁵ including human rights norms.²⁷⁶ The Constitution

273. *Id.* at art. II, § 2, cl. 2.

274. Custom "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (holding, by looking at the work of learned writers, that a statute proscribing piracy as defined by the Law of Nations was sufficiently clear to afford the basis for a death sentence).

275. Almost a century ago, in *The Paquete Habana*, 175 U.S. 677 (1900), the Supreme Court for the first time ruled that customary law is the law of our land:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations

Id. at 700.

276. *See Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), . . . an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."). *See also id.* at 884 ("Having examined the sources from which customary international law is derived . . . the usage of nations . . . we conclude that official torture is now prohibited by the law of nations.").

In *Filartiga*, the court plainly explained customary law and general principles as sources of international law in our domestic system:

[w]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usage of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 880-81 (quoting *Paquete Habana*, 175 U.S. at 700). *See also* *Lopes v. Reederei Richard Schroeder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963).

See also *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-99 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (citing to various conventions as well as the Universal Declaration as authority and/or principal sources of human rights law evidencing the custom and usage of nations and concluded that international law secured a prisoner the right to be free from arbitrary detention); RESTATEMENT, *supra* note 137, at pt. I (introductory note), pt. VII (introductory note), and § 702 (reporter's note 1) (listing as rules of customary interna-

provides that Congress has the power to "define and punish . . . [o]ffenses against the Law of Nations."²⁷⁷

Finally, strengthening the reality that international human rights norms are binding law in the United States, many federal statutes refer to "internationally recognized human rights" and have legislated national policy towards governments guilty of "consistent patterns of violations" of such rights.²⁷⁸ In sum, human rights obligations assumed by the United States are legally enforceable. Thus, it is appropriate to review the doctrine that guides the application of the various sources, particularly when they present inconsistent, or potentially conflicting, principles.

Over a century ago, the Court not only upheld the plenary power of Congress to exclude aliens based upon the State's sovereignty,²⁷⁹ it also concluded that the Court had to give effect to acts of Congress even if inconsistent with a *prior* treaty obligation.²⁸⁰ Later the Court clarified that in circumstances that present a competing (and conflicting) Act of Congress and a treaty, the later in

tional law prohibitions against slavery, murder or causing disappearance of individuals, and racial discrimination, in addition to torture and arbitrary detention). Much of the established customary law has been codified by international legal agreements. Even once codified, however, customary law remains an enforceable source of law. This is significant because custom then becomes the basis for the enforceability of the obligation *vis à vis* states that have not become signatories to the treaties.

277. U.S. CONST. art. I, § 8, cl. 10.

278. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). This particular statute is the basis for the action maintained in *Filartiga*. Another example of federal legislation concerning international human rights is the United States Foreign Assistance Act of 1961, as amended, which states:

No assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, . . . or other flagrant denial of the right to life, liberty and the security of the person . . .

22 U.S.C. § 2151n(a) (1994)

279. The Chinese Exclusion Case, 130 U.S. 581 (1889). This power to exclude appeared to be grounded on nativistic feelings. The Court noted that "[i]t seemed impossible for [the Chinese] to assimilate with *our* people or to make any change in *their* habits or modes of living." *Id.* at 595. Thus, the Court suggested that excluding Chinese workers was "essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there." *Id.* at 594.

280. Head Money Cases, 112 U.S. 580, 599 (1884) (concluding that a statute would be given effect in light of conflict with an earlier treaty, the Court stated "The Constitution gives no superiority [to a treaty] over an Act of Congress. . . . Nor is there anything, in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity. A treaty is made by the President and the Senate. Statutes are made by the President, Senate and the House of Representatives. . . . If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate.").

time will prevail.²⁸¹ While the supremacy of the Constitution over treaties has been recognized,²⁸² no such definitive statement has been made with respect to the Constitution's supremacy over customary law, although commentators appear to accept that in the event of a conflict the Court would reach the same result as with treaties.²⁸³ Finally, perhaps indicative of a more insular climate, a lower court found that although the detention of certain undocumented foreigners contravened international law principles, the Attorney General's decision to effect such detention was binding on the courts and courts should not compel the executive to follow international law.²⁸⁴

It should be noted, however, that whenever possible, the diverse mandates should be read as consistent with each other, thus minimizing any potential problem.²⁸⁵ Indeed, the Court has yet to hold that any treaty provision violates the Constitution. To the con-

281. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution, a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self executing."); *The Chinese Exclusion Case*, 130 U.S. at 600 (holding that later Act of Congress allowing exclusion of Chinese could abrogate a prior U.S.-China agreement that would have permitted the petitioner to re-enter the United States).

282. *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

283. See Henkin, *supra* note 166, at 869. Professor Henkin posits that [a]rguably, the fact that treaties are subject to constitutional limitations does not conclude the issue with respect to customary law. Customary law is general law binding on all nations, and no country should be able to derogate from it because of that country's particular constitutional dispositions. The law of nations antedated the Constitution, and the framers evinced no disposition to subordinate that law to the new Constitution. Nevertheless, it is unlikely that the Court would subordinate the Constitution to the law of nations and give effect to a principle of international law without regard to constitutional constraints. The Court's jurisprudence about treaties inevitably reflects assumptions about the relation between international and United States law. . . . Thus we can assume that, like treaties, customary law is inferior to the United States Constitution in the hierarchy of our domestic law.

Id. at 869-70 (footnotes omitted). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 435 (1964) (suggesting that custom has supremacy over state law pursuant to article VI of the Constitution).

284. *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (N.D. Ga. 1985), *aff'd sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986).

285. See *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) ("[a]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.").

trary, courts have used international law to assist with the construction of statutory requirements.²⁸⁶

Significantly, the United States has only signed and ratified,²⁸⁷ and thus is accountable for, several international human rights agreements:²⁸⁸ the U.N. Charter;²⁸⁹ the OAS Charter;²⁹⁰ the ICCPR;²⁹¹ the Protocol Relating to the Status of Refugees (Refugee Protocol);²⁹² and the Race Convention.²⁹³ However, with respect even to the ratified treaties, the United States has expressly declared these to be non-self executing,²⁹⁴ rendering them not domestically enforceable until passage of the requisite enabling legis-

286. See *supra* notes 275 & 276 and *infra* notes 298 & 299 (discussing use of international principles by courts).

287. Ratification is a significant factor in domestic enforcement. The United States becomes internationally accountable for treaty obligations upon signing by the President or her/his plenipotentiary. However, the United States does not become domestically accountable until there is ratification which includes the constitutionally mandated advice and consent function of the Senate. RESTATEMENT, *supra* note 137, at § 312 cmt. d. Thus, the United States is internationally, but not domestically, accountable with respect to documents it has signed, such as the Economic Covenant, *supra* note 248; the Child Convention, *supra* note 261; and the Women's Convention, *supra* note 261.

288. In addition to those listed, the United States also is a party to various other human rights agreements including the Slavery Convention of 1926, Sept. 26, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; the Protocol Amending the Slavery Convention of 1926, *opened for signature* Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51; the Inter-American Convention on Granting of Political Rights to Women, May 2, 1948, 27 U.S.T. 3301, O.A.S.T.S. No. 3; the Convention on the Political Rights of Women, 27 U.S.T. 1909, 193 U.N.T.S. 135; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; the Convention Against Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, Hein's No. KAV 2303; and the four Geneva Conventions: Geneva I, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva II, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva III, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva IV, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

289. U.N. CHARTER, June 26, 1945, 59 Stat. 1031.

290. OAS Charter, *supra* note 248.

291. ICCPR, *supra* note 227.

292. Cameroon, Central African Republic, Gambia, the Holy See, Senegal, etc: Protocol Relating to Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

293. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

294. See Convention on the Prevention and Punishment of the Crime of Genocide, U.S. Reservations and Understandings, 28 I.L.M. 779, 782 (1989); Letter of Submittal, Dept. of State, Dec. 17, 1977, International Covenant on Civil and Political Rights ("The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."); Letter of Submittal, Dept. of State, Dec. 17, 1977, International Convention on the Elimination of All Forms of Racial Discrimination ("The United States declares that the provisions of Articles 1 through 7 of this convention are not self-executing.").

lation.²⁹⁵ It is noteworthy that the first time the United States' human rights record was subject to international review (pursuant to the requisite yearly report to the Human Rights Commission ("HR Commission") under Article 40 of the ICCPR), the HR Commission severely criticized the United States for not accepting the covenant as domestic law.²⁹⁶ The basis of the HR Commission's criticism was that ratification alone delivered no new rights and U.S. courts would not heed the Covenant at all—a fear that is well-founded in precedent.²⁹⁷

Regardless of whether a treaty is non-self executing or signed but not ratified, the rights contained therein can be domestically enforceable legal rights if they constitute customary international law, as *Paquete Habana* and, more recently, *Filartiga* plainly concluded.²⁹⁸ Indeed, U.S. Courts have consistently referred to international agreements as a means to assist with the application and interpretation of domestic law.²⁹⁹

295. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976) ("It is only when a treaty is self-executing, when it provides rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights.").

296. At the March 29, 1995 meeting of the HR Commission, Conrad K. Harper, Legal Advisor to the U.S. State Department, noted that Articles 1-27, the substantive provisions of the ICCPR, had been declared non-self-executing under U.S. domestic law, and therefore were unenforceable in U.S. courts *sans* enabling legislation. He maintained that this decision in no way affected the United States' obligations under the Covenant. Some Commissioners criticized this approach as evidence of an unwillingness to conform U.S. laws to the demands of the Covenant. For its part, the U.S. defended its stance stating a preference not to use the unicameral treaty power of the Constitution to effect direct changes in domestic law. Additionally, the United States contended that almost all of the rights enumerated in the Covenant were already protected under U.S. law and did not require special enabling legislation.

297. *See, e.g., Hitai v. Immigration and Naturalization Serv.*, 343 F.2d 466, 468 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) (U.N. Charter provision held not self-executing and thus unable to invalidate immigration law provision); *Sei Fujii v. California*, 217 P.2d 481 (Cal. Ct. App. 1950), *vacated*, 242 P.2d 617 (Cal. 1952) (U.N. Charter held not self-executing and thus unable to invalidate state statute, although statute ultimately held unconstitutional under Fourteenth Amendment).

298. *See also Fernandez-Roque v. Smith*, 622 F. Supp. 887 (N.D. Ga. 1985), *aff'd sub nom. Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986) (Circuit Court held long term detention of Cuban refugees to be a violation of international law, but failed to enjoin actions committed under authority of Attorney General).

299. *The Paquete Habana*, 175 U.S. 677 (1900); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D.Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (considering principles of international and constitutional law and interpreting relevant statute as not authorizing indefinite detention of alien); *Fernandez-Roque v. Smith* (long term detention of Cubans violative of international law but courts failed to enjoin violation committed under authority of Attorney General).

In addition to the limitations placed on domestic enforcement of treaties by the notion of non-self execution, the concept of reservations or conditions³⁰⁰ also can result in shielding the state from liability. Established norms, however, prohibit reservations that are incompatible with "the purpose and object of a treaty."³⁰¹ Thus, and of particular importance with respect to human rights norms, a reservation designed to enable a state to suspend a non-derogable fundamental right will be deemed ineffectual and consequently, a reservation against a right that is *jus cogens*—a peremptory norm—is void and the obligation is binding *erga omnes*.³⁰²

It follows from this analysis that notwithstanding sovereignty arguments, a State's alienage-based classification that effectively draws distinctions on, for example, race or religion, could be invalidated as violative of non-derogable human rights obligations. As Professor Henkin has observed:

The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during our fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a pre-eighties jurisprudence that we have proudly rejected in other respects.³⁰³

300. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(a), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1990) [hereinafter Vienna Convention] ("unilateral statement[s] . . . made by a state when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state"). See also Restatement, *supra* note 137, at § 313, cmt. g. Any unilateral statement of a state that "purports to exclude, limit, or modify the state's legal obligation" under the treaty is deemed a reservation, regardless of whether it is labelled a reservation, a "declaration," or an "understanding," as the United States did with the ICCPR. *Id.*

301. Vienna Convention, *supra* note 300, at art. 19(c); RESTATEMENT, *supra* note 137, at § 313(1)(c). Whether a reservation contravenes the object and purpose is an issue that is resolved by judicial decision.

302. For example, if the reservation seeks to avoid a prohibition against racial discrimination or genocide, the reservation itself will fail and the state remains bound to respect the protected right. It is not yet clear whether the same conclusion would be reached regarding sex discrimination, although it should be, since the human rights conventions list sex as a protected right along with race, color, religion, national origin, etc.

303. Henkin, *supra* note 166, at 862.

VI. A Challenge for the Future

Whether the concept of sovereignty and the related maxim that sovereignty bestows upon the sovereign unfettered power to regulate within its borders should be described as “carapaces” or “fossils” can be debated. What is not open to debate is that the precept cannot in today’s global society permit the sovereign to disarm the human rights structure by denying basic rights or disavowing accountability for the observance, protection and enforcement of such rights. What is insupportable is the argument that sovereignty is a static concept, carved in stone and flanked by armor. The reality, as *Nuremberg* established, is that sovereignty is a solid, but permeable theory capable of incorporating evolving philosophies of how States are obligated to treat persons both within and without their borders.

This receptive model of sovereignty, whose unfetteredness must stop where inviolable human rights begin, is an appropriate one in the context of which to examine and develop alienage classifications. Indeed, I would posit this to be the model tacitly contained in the New York City Human Rights Law and pursued by the City Commission as inferred from its prohibitions against discrimination on the bases of alienage and citizenship status. And here lies the challenge for the future.

First, it is surprising that, considering the generosity of the city’s law with respect to citizenship, alienage cases comprise less than one percent of the City Commission’s docket.³⁰⁴ This might change, however, in light of the apparent retrenchment from alienage protections not only in case law but also in legislative initiatives—both local and federal—that seek to nullify the rights that do exist.

The change in the “open arms welcome” trend of *Graham* and *Plyler* was evident early on in the various dissenting opinions of now-Chief Justice Rehnquist, which currently represent the majority stance. The Chief Justice’s opinions have been inhospitable to “aliens,” and reveal a predisposition to permit a broad disadvantaging or burdening of non-citizens—regardless of whether they are legally present or not—on reasons ranging from preemptive powers to statutory and constitutional construction of equality norms. For example, in his 1973 dissents in *Sugarman* and *Griffith*, Justice Rehnquist rejected the equal protection challenge, and the classification of alienage as suspect, by noting that “[t]he mere reci-

304. See *supra* note 133 and accompanying text.

tation of the words 'insular and discrete' minority is hardly a *constitutional* reason for prohibiting state legislative classifications such as are involved here"³⁰⁵ He even refused to recognize alienage as "a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual. . . . There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts."³⁰⁶ Thus, Justice Rehnquist insists that "the proper judicial inquiry is whether any rational justification exists for prohibiting aliens from employment in the competitive civil service and from admission to a state bar,"³⁰⁷ and, on that basis, he concludes that it is not irrational for the states to pass such laws which, consequently, in his view, are valid.³⁰⁸

More than ten years later, in *Toll v. Moreno*,³⁰⁹ the Court's majority, rather than apply a due process/equal protection analysis, concluded on supremacy clause grounds that the University of Maryland's policy of denying "in-state" tuition to children of G-4

305. *Sugarman*, 413 U.S. at 656 (Rehnquist, J., dissenting) (emphasis in original).

306. *Id.* at 657. Justice Rehnquist repeated this non-immutability argument in his dissent in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), another case in which the majority invalidated a New York statutory classification—this one restricting foreigners' receipt of state financial assistance for higher education. The majority concluded that the citizenship requirement was subject to strict scrutiny and violated the Equal Protection clause of the Fourteenth Amendment as it unconstitutionally discriminated against aliens. On the other hand, Justice Rehnquist, using the mutability argument he presented in *Sugarman*, concluded that the proper basis of review was "rational basis" because, while accepting the *Graham* premise that alienage classifications are inherently suspect, the classification in *Mauclet* did not create a "discrete and insular minority." *Id.* at 15-22.

307. *Sugarman*, 413 U.S. at 658.

308. The rationale provides insight into the nativistic underpinnings of Justice Rehnquist's conclusions, which are infused with "fear of others" and "us versus them" presuppositions of the lack of trustworthiness and moral inferiority of "others":

It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect "government" to treat us. An alien who grew up in a country in which political mores do not reject bribery or self-dealing to the same extent our culture does; in which an imperious bureaucracy historically adopted a complacent or contemptuous attitude toward those it was supposed to serve; in which fewer if any checks existed on administrative abuses; in which "low-level" civil servants serve at the will of their superiors—could rationally be thought not to be able to deal with the public and with citizen civil servants with the same rapport than one familiar with our political and social mores would. . . . All these factors could materially affect the efficient functioning of the city government, and possibly as well the very integrity of that government.

Id. at 662.

309. 458 U.S. 1 (1982).

visa holders³¹⁰ was unconstitutional. Justice Rehnquist's dissent urged that the INA did not preclude a state's passage of laws that impose any onus on non-citizens unless Congress has "unambiguously declared [an] . . . intention"³¹¹ to preempt the subject, noting that "[i]n light of several recent decisions, . . . it is clear that not every alienage classification is subject to strict scrutiny" and endorsing a rational basis test.³¹² Only one year later, Justice Rehnquist simply re-adopted his *Sugarman* rationale to reject the majority's conclusion that Texas could not constitutionally bar resident aliens from becoming notaries public.³¹³

Some suggest that international human rights norms should be used simply as interpretive aids in constitutional construction and that urging their use anything more is misinformed zealotry.³¹⁴ This essay posits that human rights norms *are* positive law, constitutionally relevant, independent legal sources, and should be used as foundations for informed judicial decision-making. To be sure, this is not a new concept. From *Paquete Habana* to *Filartiga* to *Rodriguez-Fernandez* to *Garcia-Mir*, courts have been doing just that. Human rights norms are valuable tools to combat nativistic propositions.

The current state and federal initiatives are not really very different from the positions Chief Justice Rehnquist has espoused for over two decades. These laws not only reveal a patent opprobrium towards aliens, but their xenophobic provisions—as are Justice Rehnquist's rationales—are subject to challenge on basic human rights grounds.³¹⁵ For example, Proposition 187 simply seeks to eliminate "illegal aliens" from eligibility³¹⁶ to receive certain social public services such as health care,³¹⁷ public elementary and secon-

310. These are employees of international organizations and their families. INA § 1101(a)(15)(G).

311. 458 U.S. at 26 (Rehnquist, J., dissenting).

312. *Id.* at 39. Justice Blackmun's concurrence criticized this view and reiterated that alienage is a suspect classification. *Id.* at 19.

313. *Bernal v. Fainter*, 467 U.S. 216 (1984).

314. Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 19, 31-35 (1983).

315. For a full discussion on how international human rights norms can be used to challenge Proposition 187 and clone legislation, see *Rights in Collision*, *supra* note 61.

316. CAL. WELF. & INST. CODE § 10001.5 (West 1995). The proposition identifies those ineligible to receive the public social benefits by designating three categories of persons eligible to receive benefits: "(1) [a] citizen of the United States[;] (2) [a]n alien lawfully admitted as a permanent resident[;] (3) [a]n alien lawfully admitted for a temporary period of time."

317. CAL. HEALTH & SAFETY CODE § 130(c) (West 1995) (emergency services excluded).

dary school education,³¹⁸ and public post-secondary education.³¹⁹ To achieve these goals the Proposition requires that public servants who *reasonably suspect*³²⁰ that these *aliens* are trying to obtain services report them to the authorities.

Although the proposition's purported goal is to keep out "illegal aliens," it really is targeted at keeping the "brown" people out. It does not even address those who were lawfully admitted but have overstayed their welcome—a group that demographically is a much "better fit" within the mythical melting pot.³²¹

Thus, the under-inclusiveness of such provision, like the reasonable suspicion standard, reveals the law's true racist and mean-spirited nature and renders the legislation ripe for an international law-based challenge on the bases of equality and non-discrimination principles. First, it should be illegal *presence*, not manner of entry, to which a state objects. As such, the law can be challenged for impermissibly discriminating between/among similarly situated persons—those *illegally* present—based on the prohibited grounds of color, race, and national origin.

Second, the factors that will arouse the requisite suspicion, such as a person's "look"—physical appearance including complexion,

318. CAL. EDUC. CODE § 48215(e) (West 1995). In addition, any notice provided must also be provided to the parent of the enrollee or pupil. This section also requires verification by school districts of the legal status of each child enrolled and in attendance in the school district. *Id.* at (c). Finally, this section provides that for students whose legal status in the U.S. can not be verified, there is a ninety day period during which educational services will continue to be delivered. In fact, the statute expressly provides that "[s]uch ninety day period shall be utilized to accomplish an orderly transition to a school in the child's country of origin." *Id.* at (f).

319. CAL. EDUC. CODE § 66010.8. This section requires that public post-secondary educational institutions verify the status of each person enrolled or in attendance at the institution.

320. CAL. WELF. & INST. CODE § 10001.5 (West 1995) ("any public entity . . . to whom a person has applied for public social services determines or *reasonably suspects*, based upon the information provided to it, that the person is an alien in the United States in violation of federal law . . . shall not provide the person with benefits or services[.] . . . [shall] notify the person of his or her apparent illegal immigration status[.] and notify the State Director of Social Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status, and shall provide any additional information that may be requested by any other public entity.") (emphasis added).

321. This is significant in light of statistics: in 1994 it was estimated that of the total "illegal immigrant" population in the United States, 1,909,000 *entered* illegally and were consequently subject to the harsh provisions of Proposition 187, but that 2,070,000 *entered* legally and *stayed illegally*, and thus were not subject to the immigration reform measures imposed on others similarly situated. Residents of 22 selected countries, largely in western Europe, are allowed to stay in the United States for up to 90 days simply by purchasing a round-trip ticket.

height, hair color and texture, manner of dress—or “sound”—foreign accented, so-called “broken” or less than perfect English, or use of another language altogether—are but thinly veiled codes for prohibited discrimination on the bases of race, color, national or social origin, birth and language.

Further, the denial of health services can violate not only the express right to health but, given the reporting requirements, might also violate the right to privacy and family life. Similarly invasive, and thus violative of the international right of privacy, are the proposed federal law’s provisions requiring establishment of a national database containing information on all Americans and immigrants eligible to work;³²² that all persons carry a national identity card;³²³ and that all children register with the Social Security Administration by age 16 and provide “fingerprint or other biometric data” that will be placed on the child’s birth certificate.³²⁴

The attempts to deny educational benefits are particularly egregious because “[e]ducation is a human right and an essential tool for achieving the goals of equality, development and peace,”³²⁵ protected by numerous international instruments and binding on the U.S. either as customary law or as conventional law. This plot to deny children the right to education is not only illegal, it is hateful against children who themselves are not only defenseless in the legal maze but very strongly protected by human rights norms. Further this denial of education and the concomitant reporting requirements not only interfere with the internationally recognized and respected rights to privacy and family life, but also deprive the students (and their parents) of their right to obtain and impart information by being denied access to the educational forum, and interfere with the protected freedom of association not only of the children wrongfully kept out of school but also of those who are allowed to remain but deprived of the presence of their “illegal” counterparts and of the learning to which they could contribute.

Finally, the issue of sex discrimination—crystallizing the indivisibility of rights—presents a serious challenge to such laws. For example, denial of health services to women raises issues of maternal health, maternal and infant mortality (thus also implicating the

322. ICFRA § 111.

323. *Id.*

324. *Id.* § 115.

325. United Nations Fourth World Conference on Women, Declaration and Platform for Action, ¶ 71, U.N. Doc. A/CONF. 1771.5 [hereinafter Beijing Platform].

right to life³²⁶), and infant health—all issues that have been at the center of the international human rights discourse in recent years with the strongest of endorsements by the United States.³²⁷ Similarly, denial of education, because of historic denial of equality to girls results in further marginalization based on sex, subjecting the education provisions to challenge on gender grounds.³²⁸

New York City, by virtue of its human rights law and policy, is a global leader in affording non-citizens virtually every protection that in other jurisdictions might have to be argued on *international* human rights grounds. It provides for equality in housing, employment and other public places which would include schools and hospitals. So our fair city, *the City*, has been going against the national current, perhaps prognosticating it, for a number of years, *extending* protections to the new “huddled masses” that courts and legislatures alike are disdaining. The city’s present mayor, Rudolph Guiliani, in tune with the city’s human rights philosophy, has similarly gone against the tide of the nation (and his party) speaking out in favor of open doors. So too has Pope John Paul II, who during his October 1995 visit to the United States denounced the

326. Universal Declaration, *supra* note 244, at art. 3; ICCPR, *supra* note 227, at art. 6; Child Convention, *supra* note 261, at art. 6; African Charter, *supra* note 261, at art. 4; American Convention, *supra* note 248, at art. 4; European Convention, *supra* note 248, at art. 2.

327. First Lady Hillary Rodham Clinton, Speech at the United Nations Fourth World Conference on Women, Beijing, China (Sept. 5, 1995) (“If there is one message that echoes forth from this conference, it is that human rights are women’s rights And women’s rights are human rights.” She specifically notes that girls and women are lacking health and education services.). (Copy on file with the author). See, e.g., Beijing Platform, *supra* note 325, at decl. ¶ 17 (right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment); ¶ 91 (“Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Women’s health involves their emotional, social and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology. However, health and well-being elude the majority of women.”); *id.*, *passim*, Ch. IV. Sec. C (on women’s health). United Nations Human Development Programme, Human Development Report 75 (1995) (“a widespread pattern of inequality between women and men—in their access to education, health and nutrition . . .”).

328. See, e.g., Beijing Platform, *supra* note 325, at decl. ¶ 27 (promote provision of basic education, life-long education, literacy and training, and primary health care for girls and women); ¶ 71 (“Education is a human right and an essential tool for achieving the goals of equality, development and peace Literacy of women is an important key to improving health, nutrition and education in the family”); *id.*, *passim*, Ch. IV, Sec. B (on women’s education).

tide of nativism and urged that this great country continue its tradition of receiving the less fortunate with open arms.

And there is more. Alienage, contrary to its historic treatment, cannot, and should not, be considered in isolation. Every individual's personhood is in fact comprised of her race, sex, color, national origin, language characteristics which, in turn, are embraced by the numerous indivisible human rights protections. If our migrant/immigrant tradition is to continue, as it should, our laws must accommodate such complex, multidimensional concerns that arise out of the interaction of, for example, alienage and sex, alienage and race and so on. The English and the German might have easily melted in the pot, and perhaps even the Irish and the Welsh. But the ingredients are different now, the taxonomy does not always allow the same "blending in," even *within* a sub-group, for example Latinas/os. Thus emerges the need for a constructive, holistic approach—one that is hospitable to and adopts an indivisibility of rights model, rather than a destructive one that focuses on singular differences to divide and, in so doing, discounts the many similarities.

The schizophrenia and apparent inconsistencies in alienage decisions and policy-making can be explained by an arcane theory of unfettered sovereignty which would allow a State to ignore both human rights considerations and Lady Liberty's welcoming message. This author shares Justice Blackmun's appreciation of the value of immigrants to American society. This value, however, must be seen to carry with it the correlative responsibility of the society to protect and afford all people basic rights. This value is not in the mythical melting pot that presumes homogeneity, but in the veritable *mélange* of colors, cultures and languages that is American society.

There are many reasons why people from all over the world have chosen and continue to choose to come to the U.S., the land where everyone has at some time been an immigrant/migrant. Some flee from economic conditions, repressive governments or political unrest, others flee to loved ones, work or better opportunities. All have the right to dream. It is one thing to discourage others/outsiders from coming and still quite another to dismiss and deny their basic human rights once they have arrived. Foreigners are not America's problem; they may well be America's salvation. "Illegal aliens" are not the enemy; fear is, and the only way to combat fear is to provide education, information, and shelter, not to deny these services. We have to work at helping and healing and getting to

know one another. Perhaps then there will be no more nasty encounters with Angry Diners and everyone will feel welcome and at home.

